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Submitted

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~468~~. 236

SAMUEL A. COOLEY AND HENRY G. JUDD, PLAINTIFFS IN ERROR,

vs.

MARY O'CONNOR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

FILED JULY 22, 1870.

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1 THE UNITED STATES OF AMERICA.

The President of the United States to the judges of the circuit court of the United States for the fourth circuit in and for the district of South Carolina:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you or some of you, between Mary O'Connor, plaintiff, and Samuel A. Cooley and Henry G. Judd, defendant, a manifest error hath happened, to the great damage of the said Samuel A. Cooley and Henry G. Judd, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have

2 the same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the first Monday in December, in the year of our Lord one thousand eight hundred and sixty-nine.

[SEAL.] DAN'L HORLBECK,
C. C. C. U. S. for S. C.

(Indorsed:) United States of America, district of South Carolina. Samuel A. Cooley & Henry G. Judd v. Mary O'Connor. Writ of error. D. T. Corbin, U. S. att'y.

This writ of error is prosecuted for and on behalf of the United States, by direction of the Hon. E. R. Hoar, Att'y Gen'l, U. S.

D. T. CORBIN,
U. S. Att'y for S. C.

UNITED STATES OF AMERICA,
Office clerk circuit court for South Carolina district.

Filed 11th June, 1870, & copy for def't.

DAN'L HORLBECK,
C. C. C. U. S. for S. C.

3 The United States of America to Mary O'Connor, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America to be holden at Washington on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of South Carolina, wherein Samuel A. Cooley and Henry G. Judd are plaintiffs and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice done to the parties in that behalf.

Witness my hand and seal at the city of Charleston, in the district of South Carolina, this eleventh day of June, A. D. 1870.

GEO. S. BRYAN,
U. S. Judge, Dis't of S. Ca.

(Indorsed:)

UNITED STATES MARSHAL'S OFFICE,
SOUTH CAROLINA DISTRICT, *Charleston, June* 11, 1870.

I hereby depute W'm D. Hannifire to execute the within process.

L. E. JOHNSON,
U. S. Marshal.

CHARLESTON, *June* 11*th*, 1870.

I hereby certify that I executed the within process by laving a copy of the within with the defendant's attorney, who accepted service on the 11th day of June, 1870.

W. D. HANNIFIRE,
Special Deputy.

I accept service of a copy of the within citation.
June 11, 1870.

M. P. O'CONNOR,
Att'y for Def't in Error.

4 *Record.*

THE UNITED STATES OF AMERICA,
District of South Carolina, to wit:

At a circuit court of the United States for the fourth circuit in and for the district of South Carolina, begun and holden at Charleston, in the district aforesaid, on the first Monday in April, 1869, before the Honorable George S. Bryan, judge of the said United States for the district of South Carolina, holding said circuit court according to the form of act of Congress in such case made and provided, the following proceedings were had:

SAMUEL A. COOLEY & HENRY G. JUDD
v.
MARY O'CONNOR. } Petition for certiorari.

Circuit court of the United States of America for the district of South Carolina, in the fourth circuit.

To the judges of the circuit court of the United States of America for the district of South Carolina, in the fourth circuit:

The petition of Samuel A. Cooley and Henry G. Judd respect-
5 fully shows that your petition were, prior to the commencement of suit hereinafter refered to, tenants of the United States, and as such occupied certain lands, tenements of the United States, situated in the county of Beaufort and State of South Carolina; and that on or about the 24th day of November, A. D. 1868, a suit was commenced against your petitioners by Mary O'Connor in the court of common pleas for Beaufort County, in the State of South Carolina, for or on account of the title to the lands and tenaments aforesaid, set up or claimed by your petitioners under the revenue law of the United States, and that they have been served with process in said suit in said county of Beaufort, in said idstrict of South Carolina, and no trial has been had in said cause. Your petitioners therefore pray that in pursuance of the act of Congress in such case made and provided that said cause so commenced in the said court of common pleas may be removed there-

from and entered on the docket of this honorable court, and thereafter proceeded in as a cause originally commenced in this court.

And your petitioners will ever pray, &c.

SAMUEL A. COOLEY.
H. G. JUDD.

DISTRICT OF SOUTH CAROLINA,
Beaufort County:

Samuel A. Cooley and Henry G. Judd, the above-named petitioners, being duly sworn, depose and say the matter set fourth in the foregoing petition are true to the best of their knowledge, information, and belief.

6

H. G. JUDD.

Sworn to before me.

D. L. THOMSON, *Magistrate.*

I, W. E. Wording, certify that, as counsel for the petitioners, I have examined into the proceedings against them, and have carefully inquired all the matters set forth in the written petition, and I believe the same to be true.

Beaufort County, S. Ca., March 3rd, A. D. 1869.

W. E. WORDING,
Counselor of the said Court of Common Pleas of Beaufort County.

UNITED STATES OF AMERICA,
U. S. circuit court.

Hon. George S. Bryan, judge, presiding.

SAMUEL A. COOLEY, HENRY G. JUDD, *v.* MARY O'CONNOR. } Order.

On hearing the petition in this case and the affidavits attached, ordered that a writ of certiorari issue as therein prayed.

(Signed) GEORGE S. BRYAN, *Dist. Judge.*

Writ of certiorari.

The President of the United States of America to the judge of the court of common pleas for the county of Beaufort, S. C., greeting:

7

We, for certain reasons, being desirous that our circuit court of the United States for the district of South Carolina, in the fourth circuit, shall be certified of a certain cause commenced before you against Samuel A. Cooley and Henry G. Judd, defendants, by Mary O'Connor, plain'ff, do therefore command you that all the record and proceedings in the said cause you distinctly and openly send to the said circuit court at the city of Charleston on the first Monday of April, A. D. 1869, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, on the fourth day of April, A. D. 1869.

DAN'L HORLBECK,
C. C. C. U. S. for So. Ca.

D. T. CORBIN,
U. S. Att'y, Att'y for Def'ts.

8 UNITED STATES MARSHAL'S OFFICE,
SOUTH CAROLINA DISTRICT, *Charleston, 3rd April*, 1869.

I hereby depute Alfred Williams, esq., to execute the within process.

J. P. M. EPPING,
U. S. Marshal.

Service.

BEAUFORT, S. C., *April* 6, 1869.

I hereby certify that I executed the within process by serving a copy thereof, with a notice thereon endorsed, upon Henry G. Judd, C. C. P., Beaufort County, from whom I obtained an acknowledgment of such service on the 6th day of April, 1869.

ALFRED WILLIAMS,
Special Deputy.

Due service of a copy of the within and of the above notice is hereby admited this sixth day of April, 1869.

H. G. JUDD,
C. C. P., Beaufort County.

Due service of a copy of the within and the above notice is hereby admitted this day of , 1869.

M. P. O'CONNOR,
Att'y for Mary O'Connor.

9 *Return of H. G. Judd, clerk of court of common pleas and general sessions for Beaufort County, to the writ of certiorari.*

STATE OF SOUTH CAROLINA,
Beaufort County, ss:

I, H. G. Judd, clerk of the court of common pleas and general sessions for Beaufort County and State aforesaid, do hereby certify that the writing hereunto annexed, consisting of four pages, doth contain a full and true exemplification of all the proceedings in the court aforesaid in a certain case, wherein Mary O'Conner is plaintiff and Samuel A. Cooley and Henry G. Judd, defendents, as appears by the original records remaining in my office.

In testimony whereof I have hereunto set my hand and affixed my seal of office at Beaufort, on the 6th day of April, in the year of our Lord 1869, and in the 93rd year of the soverignty and independence of the United States of America.

[SEAL.]

H. G. JUDD,
C. C. P. & G. S.

State of South Carolina to all and singular the sherriffs of the said State, greeting:

You and each of you are hereby commanded, without delay, to attach the bodies of Samuel A. Cooley and Henry G. Judd, defendants,
10 wheresoever they may be found within your and each of your respective counties, so that you compel them to be and appear before the justices of the said court at the court of common pleas, to be holden at Beaufort for the county of Beaufort, on the third Monday of December next, to answer to Mrs. Mary O'Connor, plaintiff, in a plea of trespass; wherefore with force and arms, they the said defendants, the

tract of land, close, or premises of her the said plaintiff, situate, lying, and being in the county of Beaufort, in the State aforesaid, did break and enter, and the fences in the said close did pull and break down, and did break, cut down, and dig up and destroy the timber, trees, grass, and earth of her the said plaintiff within the said close, there growing and being, and of great value, and other wrongs and enormities then and there did against the peace and dignity of said State; to the damage of said plaintiff eighteen thousand dollars, and here you this writ before the clerk of the said court at Beaufort, fifteen days next before the sitting thereof.

Witness, H. G. Judd, esq., clerk of said court, at Beaufort, the 24th day of October, in the year of our Lord 1868, and in the 93rd year of the sovereignty and independence of the United States of America.

H. G. JUDD, *C. C. P.*

[SEAL.]

M. P. O'CONNOR,
Plaintiff's Attorney.

11 (Endorsed:)

Samuel A. Cooley and Henry G. Judd:

You are arrested by virtue of or served with this writ or process to the intent that you, by your attorney, appear at the court of common pleas in Beaufort, at the next sitting thereof, being the third Monday in December next, in order to make your defence in this action; that in case of your refusal or neglect during the sitting of the next court, judgment will be entered against you by default.

M. P. O'CONNOR,
Plaintiff Attorney.

(Endorsed:) This action is brought as well to try title as for damages.

Service by my deputy, W. Milligan, Mrs. O'Connor's (pl'tff's) att'y.

I did on the 24th October, 1868, serve a copy of this writ on defendants personally.

A. W. WILLIAMS,
Sherriff Beaufort Co.

Service proven.

C. P. JUDD,
Deputy Clerk C. C. P.

Declaration.

STATE OF SOUTH CAROLINA,
Beaufort County:

Samuel A. Cooley and Henry G. Judd were attached to answer
12 to Mary O'Connor in a plea of trespass, wherefore with force and arms they, the said defendants, a tract of land, close, or premises of her the said plaintiff, situate, lying, and being in the country of Beaufort, in the State aforesaid, did break and enter, and the fences in the said close did pull and break down, and did break and cut down and dig up and destroy the timber, trees, grass, and earth of her the said plaintiff within the said close, then growing and being, and of great value, and other wrongs and enormities then and there did, against the place and dignity of the said State and to the damage of said plaintiff.

Whereupon the said plaintiff, by M. P. O'Connor, her attorney, com-

plains, that whereas she the said plaintiff, on day of A. D. in the country of Beaufort and within the jurisdiction of this court, was legally seized and possessed of the said tract of land or premises situated, lying, and being in the town of Beaufort and county aforesaid, containing 80 feet front more or less, and in depth running from north to south, down to low-water mark, 300 feet, more or less; butting and bounded north on Bay street, south on the river, and east on the lands of the plaintiff; west on lands of the plaintiff; and the said plaintiff being so legally seized and possessed thereof as aforesaid, said
13 defendants, to wit, on the day of A. D. in the country aforesaid and within the jurisdiction aforesaid, with force and arms, into the said tract of land unlawfully did break and enter, and the fences in said close did pull and break down, and did break, cut down, dig up, and destroy the timber, trees, grass, and earth of her the said plaintiff within the said close, there growing and being, and of great value, and other wrongs & enormities there and then did against the peace & dignity of the said State and to the damage of the said plaintiff eighteen thousand dollars; wherefore she brings suit, &c.

M. P. O'CONNOR,
Plaintiff's Attorney.

(Endorsed:) This action is brought to try title as well as for damages. Filed Jan. 26th, 1869. Rule to plead same day. M. P. O'Connor, plaintiff's attorney.

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

On the fourth Monday of May, A. D. 1869, comes into court the defendants, by their attorney, D. T. Corbin, U. S. attorney, and to the declaration of the said Mary O'Connor files his plea in words and tenor as follows:

14 SAMUEL A. COOLEY & HENRY G. JUDD *ads.* MARY O. CONNOR. } Plea.

And the said defendants, by D. T. Corbin, their attorney, come and defend the force and injury, when, &c., and say that they are not guilty of the said supposed trespass above laid to their charge, or any or either of them, or any part thereof, in manner and form as the said plaintiff has above thereof complained against them; and of this the said defendants put themselves upon the country, &c.

D. T. CORBIN,
Defendants' Attorney, &c., U. S. Attorney for South Carolina.

And the plaintiff doth the like.

M. P. O'CONNOR,
Plaintiff's Attorney.

On the fourth Monday of November, 1869, come again into court the parties aforesaid, by their attorneys aforesaid, and upon motion of the said Mary O'Connor, by her attorney, and by and with the consent of the said Cooley and Judd, by their attorney, further process of and upon the premises aforesaid is by order of the court continued until the first Monday in April next, at which said Monday in April,
15 in the year of our Lord 1870, comes into court the parties aforesaid, by their attorneys aforesaid.

Postea and judgment.

Therefore it is commanded that the United States marshal in and for the district of South Carolina do summon thirty-one good and lawful men, to be drawn by ballot according to law, to be and appear before the judges of said court to be holden at Charleston, in the county of Charleston, on the first Monday of April next, by whom, &c., and who neither, &c., to recognize, &c., because as well, &c., and the same day given to the parties aforesaid, at the place aforesaid, and aforesaid, that is to say, on the day and at the place aforesaid, before the judges aforesaid, comes as well the said plaintiff, by her attorney aforesaid, and the said defendants, by their attorney aforesaid, and the persons aforesaid being demanded, some of them, to wit, W'm S. Henerey and eleven others, come, and being drawn by ballot according to law, and sworn as the jurors aforesaid to say the truth within contained, do on their oaths say, that we find the within-described promises, to wit, the lot of land in the town of Beaufort, South Carolina, bounded on the north by Bay street, on the south by the river, and east and west by other lands of plaintiff, measuring in width, on Bay street, sixty-five feet, and in depth one hundred and seventy-five feet, togather with the build-
16 ings of brick and wood thereon, to be the property of the plaintiff, and we assess her damages for the use, profits, and injuries, at eight hundred dollars over and above her costs and charges by her about her suit in this behalf expended.

Therefore, it is considered that the said plaintiff do recover against the said defendants the said described premises and the damages as found by the jury aforesaid; and also $ for costs and damages aforesaid to the said plaintiff by the said court now here with her assent adjudged, which said damages, costs, and charges amount in the whole to $, and be the said defendants in mercy, &c.

M. P. O'CONNOR, *Pl'ff's Att'y.*

Judgment signed & entered this fourth day of June, A. D. 1870.

DANIEL HORLBECK,
Clerk Circuit Court United States for S. C.

17 In the circuit court for the district of South Carolina, fourth circuit.

MARY O'CONNOR
v.
SAMUEL A. COOLEY, HENRY G. JUDD. } April term, 1870.

At the trial of the cause the plaintiff, to maintain & prove the issue on her part, gave in evidence tending to prove that the plaintiff, Mrs. Mary O'Connor, in 1861 was residing upon the premises in the plaintiff's declaration mentioned, and that she abandoned them in November, 1861, in consequence of the federal fleet having arrived off Beaufort, and in consequence of being informed that the confederate commander, then at Beaufort, had ordered all the citizens to leave Beaufort; that she, with nearly all the other inhabitants of Beaufort, except the coloured people, left on that occasion; that the plaintiff derived her title to this property by will from Mr. Michael O'Connor, her husband, who died in 1850; that all her titles to said property and the will were lost or destroyed at the burning of Columbia in February, 1865, and that the records of the county of Beaufort were destroyed about the same time, but Mr. Michael O'Connor has occupied the premises in question since

1827, and that the plaintiff had occupied them since the death of Mr. O'Connor in 1850 until November, 1861. That the plaintiff, on
18 her departure from Beaufort in November, 1861, left behind her in her house on said premises all her furniture, valued at two thousand dollars or more. After leaving Beaufort she resided in Charleston, then removed to Columbia, and resided there until the burning of Columbia in 1865. Plaintiff received no notice, nor was she aware of any tax placed upon her property in Beaufort by the United States government; never heard of it or saw any advertisement or public notice, and did not know of the tax until the close of the war in 1865. In May, 1865, plaintiff returned to Beaufort, and then learned that the property had been sold by the United States direct tax commissioners, and found her houses occupied by strangers; that plaintiff never voluntairily aided the rebellion, and she is still a widow; that plaintiff was offered, some years before the war, eight thousand dollars for the house and lot in suit; that the house cost ten thousand dollars; that the premises since the war would rent at the rate of from four to seven hundred dollars per annum; that the United States forces took possession of Beaufort and the parish of St. Helena, in which the town of Beaufort is situated, in South Carolina, in November, 1861, and the federal authority, by virtue of military occupation, continued in Beaufort, in said parish of St. Helena, from thence up to the time of the close of the war, (in 1865,) and that all persons loyal to the United
19 States could have safely resided at Beaufort during said period; that the federal authority was supreme, and that any law of the United States could have been carried out during said period in said town or parish; that there was a United States post office kept open at the town of Beaufort, and that there was a collection of customs and customs officers at Hilton Head part of the time.

20 And the defendants, to maintain and prove the issue on their part, gave in evidence tending to show that Samuel A. Cooley was in possession of a portion of the premises in the plaintiff's declaration mentioned as a tenant of George Holmes, who had leased said portion of said premises from the United States direct tax commissioners at Beaufort, S. C.; that, as such tenant, he went into possession in June, 1867, and continued therein until about the first of December, 1868; that he, Henry G. Judd, occupied a portion of said premises in the plaintiff declaration mentioned, as clerk of the United States direct tax commissioners at Beaufort, and by their permission and directions; that he was in possession of said premises from or about the first of June, 1867, until about the first day of December, 1868; that said Cooley and Judd, defendants, had no other right, title, or interest in said premises except as hereinbefore set forth, being mere tenants at will, in possession, and that they derived their right to possession from the U. S. direct tax commissioners at Beaufort, S. C., who acted and assumed to act for and on behalf of the U. S. of America.

The attorney for defendants then offered in evidence the following tax-sale certificate, to which the plaintiffs objected on the ground that it had not been specially pleaded. The court overruled the objec-
21 tion, and admitted the certificate.

(No. 3.)

The United States of America, tax-sale certificate No. 71.

This is to certify that at a sale of lands for unpaid taxes, under and by virtue of an act entitled "An act for the collection of direct taxes in

insurrectionary districts within the United States, and for other purposes," held persuant to notice at Beaufort, in the State of South Carolina, on the 13th day of March, A. D. 1863, the tract or parcel of land hereinafter described, situated in the town of Beaufort and State aforesaid, and described as follows, to wit: Lot E, in block 61, according to the plat of the town of Beaufort aforesaid, adopted by the U. S. direct tax commissioners for the district of South Carolina, was sold and struck off to the United States for the sum of one hundred and twenty-five dollars, being the highest sum bidden for the same, the receipt of which said sum in full is hereby acknowledged and confessed.

Given under our hands at Beaufort this 13th day of March, A. D. 1865.

W'M HENRY BRISBANE,
WILLIAM E. WORDING,
Commissioners.

22 Said certificate was shown to be genuine, and to have been made at the time that it purports to have been made, and signed by the commissioners that it purports to have been signed by, and the premises in the plaintiff's declaration mentioned were shown to be that described in the said tax certificate. Plaintiffs then objected to the tax-sale certificate on the ground that it was signed by only two commissioners, and the court sustained the objection, and held the certificate to be void for that cause. To which ruling the defendants then and there excepted. Testimony was then introduced by the defendants tending to show that there were three direct tax commissioners appointed for the State of South Carolina under the act of Congress approved June 7th, 1862, entitled "An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes," and that the names of said commissioners were A. D. Smith, William E. Wording, and William Henry Brisbane; that in October, 1862, the commissio so appointed proceeded to Beaufort, South Carolina, in the discharge of their duties; that Beaufort and the parish of St. Helena, in which the town of Beaufort is, were then in possession
23 of the United States forces. Said commissioners proceeded to open an office at Beaufort, and to enter upon their duties; said commissioners then searched dilligently for the records (of the titles) to the lands in Beaufort throughout the town and parish, and also for the records of the assessment and valuation of the lots as the same were enumerated and valued under the last assessment and valuation thereof made under the authority of the State of South Carolina previous to the first day of January, A. D. 1861; that they could not find either the records (of titles) or the records of the State assessment and valuation, as the same were either destroyed, concealed, or lost; that the town and parish of Beaufort wase at the time occupied by United States soldiers and a few colored people; that none or but few of the owners of the lands were present, having left the town prior to the entrance of the United States troops. But said commissioners did find an old assessment roll of the town of Beaufort and parish of St. Helena, and the comptroller general's report of the State for the years 1857 or 1858. The old assessment rolls and the comptroller general's report for the State, in default of better evidence, were used as evidence in making up the judgment of the commissioners, although they were very indefinate,
24 giving the names of the tax-payers and describing the property or land simply as so many "acres," without locating the same, and of the lots in the town of Beaufort were described only as

"town lots," without any other description. The commissioners then proceeded to obtain all the evidence in their power as to the assessment and valuation of the lots of land both in the town of Beaufort and in the parish of St. Helena, and to value and assess the same in their own judgment upon such evidence. They found an old plat of the town of Beaufort of the date of 1799, by which it appeared that the town had been laid off into lots and blocks. But they found that many of the streets described were not opened, and also that additions had been made to some parts of the town, and that these parts were not on the plat. The commissioners finally all resolved that said plat should be used as a basis of description for their assessment rolls, and ordered a survey of the additions to the town to be made, and thus made a new plat of the town of Beaufort. The plat thus made by the commissioners (in which the blocks throughout the town were designated by numbers, and the lots in each block by letters of the alphabet) is as follows: Said plat is hereto appended and marked "A." The counsel for the plaintiff objected to the introduction of this plat on the ground
25 that the same was not drawn in compliance with any law of Congress. The court overruled the objection and admitted the plat, and the plaintiff excepted to the ruling.

The commissioners then proceeded to value the property, using said plat as a basis for description, according to their best judgment, and the best evidence they could obtain.

The original records of the direct tax commissioners were introduced, and so much thereof as relates to the land in plaintiff's declaration mentioned is as follows:

"*United States direct tax commission.*

"Valuation of land and lots of ground in the town of Beaufort, Beaufort district, State of South Carolina, assessed under the act of Congress approved June 7th, 1862, 'for the collection of direct taxes in insurrectionary districts within the United States and for other purposes.'

"Contents, lot E, block 61, valued at $7,000; tax, $56; penalty, $28; amount, $84; tax, when fixed, November 3erd, 1862."

Evidence was then introduced tending to show that said lot E, in block 61, was the premises occupied by Cooley and Judd in 1868, and were the same as those in the plaintiff's declaration mentioned. After the assessment of the tax the commissioners gave notice by post-
26 ing in four public places in the town of Beaufort and parish of St. Helena that a direct tax had been assessed by them upon the lands in the town of Beaufort and parish of St. Helena, and the same was payable within sixty days, and that the same might be paid at the office of the commissioners in Beaufort. The taxes upon a very few of the lots, in pursuance of this notice, were paid to the commissioners, but not upon lot E, block 61, above described. After the expiration of sixty days, and on the 10th of January, 1863, the following notice and advertisement was published in a newspaper at Beaufort called the "New South:"

"*Sale of lands for unpaid direct taxes in insurrectionary districts.*

"Notice is hereby given that the several tracts or lots of land situated in the State of South Carolina, herinafter described, have become pro-

feited to the United States by reason of the non-payment thereon under the act entitled 'An act to provide increased revenue from imports, to pay interest on the public debt, and for other purposes,' approved August 15th, 1861, and an act entitled 'An act for the collection of direct taxes in insurrectionary districts within the United States and
27 for other purposes,' approved June 7th, 1862, and that the same will be sold at public auction on the 11th day of February, A. D. 1863, at 10 o'clock a. m. of said day, at the office of the direct tax commissioners, under said acts, for the State of South Carolina, in the town of Beaufort, in the parish of St. Helena, Beaufort district, and State aforesaid, and that the sale of the same will be continued from day to day until all of said lots and tracts of lands are finally disposed of."

"The following is a description of said lands forfeited as aforesaid, together with the amount of the quota of said tax and penalty charged upon each of said tracts or lots of land, respectively:

Town lots and lands in the parish of St. Helena.

Lots.	Blocks.	Quota of tax.	Penalty.	Amount.
*	*	$ * *	$ * *	$ *
E	61	$56 00	$28 00	$84 00
*	*	* *	*	* *

That said notice was published on the 10th of January, 1863, and for four weeks in said paper in succession thereafte., to wit, on the 17th, 24th, and 31st of January, and the 7th of February, 1863; and said notice was also, during the same period of publication in the newspaper, posted up in four public places throughout the town of Beaufort and parish of St. Helena. During this period of publication, there
28 was no payment, or tender of payment, of the taxes on lot E, block 61, of the town of Beaufort. On the 11th day of February, 1863, the time designated for the sale of lots of land in the town of Beaufort for taxes, the records of the direct tax commissioners show as follows:

"BEAUFORT, *February 11th*, 1863.

"Board met. Commissioners Brisbane and Wording present. Opened the sale of lands, &c., agreeably to advertisement, and sold one lot in the town of Beaufort, and postponed sale until Thursday, February 12th, 1863, at 10 o'clock a. m."

And said records show that the commissioners continued their business and adjourned from day to day until the 13th of March, 1863, when the record is as follows:

"Opened sale this morning for the sale of houses and lots in the town of Beaufort, continued until 12 o'clock, when the sale was adjourned until to-morrow morning at 10 o'clock.

("Signed) "A. D. SMITH,
"W. E. WARDING,
"WM HENRY BRISBANE,
"*Commissioners.*"

In the record of abstract of land and lots sold in the town of Beaufort,

of the United States direct tax commissioners, on this 13th of March, 1863, is found the following entry:

29 Lot.	Block.	Valuation.	Tax.	Penalty.	Cost.	10 pr. ct.	Total.
E.	61	$7,000 00	$56 00	$28 00	$4 20 cts.	$5 20	$93 40 cts.

Date of advertisement and notice, January 10th, 1863. Date of sale, March 13th, 1863. Name of purchaser, United States. Bid, $125 00. That said lot of land was bid in for the United States because no one bid higher; that there has been no attempt to redeem said lot of land from said sale, and that the United States, up to the present time, has continued in possession of said lot of land, and claims to hold the same pursuant to and by virtue of the foregoing proceedings of the tax commissioners and the tax certificate. That the rental value of said premises is about $400 00 per annum. An express company has built upon a portion of the said lot, and has occupied the same as an office prior to and since the close of the war, but they have not been made parties to this suit.

And the plaintiff in reply to the evidence of the said defendants and to rebut the same, gave in evidence tending to prove that the lot in question was in dimensions sixty-five (65) in front by one hundred and seventy-five (175) feet in depth; bounded north by Bay street, south by the river, and east and west by lands of the plaintiff. When plaintiff returned in 1865 the property could not be redeemed, as the property then was held and claimed by a third party, and the time limited for redemption after sale had expired. Evidence was also introduced tending to show that the commissioners arrived in Beaufort on the
30 24th October, 1862; that very shortly thereafter they proceeded to resurvey the town, and devided it off by lots and blocks without designating the owners. They examined no witnesses, took no evidence, did not enter upon the premises nor assertain the number of buildings upon the lot. The assessment rolls which they found, of an old date, did designate the owners of lots without giving their dimensions and boundries. The names of the owners of the property might have been found out, but the commissioners did not deem this enquiry necessary. This lot was sold on the 13th March, 1863, and bought by the government for $125; neither the owners nor a bidder could tell from the advertisement whose property, nor what kind of property was exposed, and unless explained by the commissioners, by reference to their plat, no person could be certain what was being sold, or what particular piece they were buying. The newspaper of the 17th January, 1863, which was introduced to prove the advertisement, in one of its columns contained notice that the O'Connor house, south side of Bay street, was occupied by the United States provost marshal. The commissioners at their sale bought in, with the exception of three or four, every town lot. They subsequently on the 27th January, 1864, resold this lot to Col. Moore, of the 47th New York regiment of volunteers, for seven thousand five hundred dollars, one-fourth cash, the balance payable at the end of three years. The one-fourth amounted to $1,875 00, was paid to the commissioners and by them turned over into the treasury of the United States. The remaining three-fourths was not paid when it
31 matured and the property lapsed to the government at the date of the issuance of the writ in this case. Samuel A. Cooley was

in possession of the upper part of the main building on the premises, and Henry G. Judd in possession of the lower part. The plat made by the commissioners was signed only by two of them.

The testimony on both sides being closed, the plaintiff requested the court to instruct the jury in the following particulars:

1st. That the act of Congress entitled "An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes," approved June 7th, 1862, is only prospective, and unless, therefore, at the time of its passage, or at some time before the 10th of March, 1863, (when the sale was made,) "by reason of insurrection in this portion of the State," the civil authority of the government of the United States was so obstructed that the provisions of the act approved the 5th day of August, 1861, could not be therein "peacably executed," it conferred no authority on the commissioners, and the defendants have no title.

2d. That the act of 7th June, 1862, was intended as a substi-
32 tute for the act of August, 1861, in such portions of the State only as, by reason of insurrection therein, the provisions of the act of 1861 could not be peaceably executed. If, therefore, on the 7th of June, 1862, there was no insurrection in that portion of the State known as "Saint Helena Parish," (in which is the land in dispute,) and the civil authority of the government of the U. S., in and over the said parish, had before then been restored, and from thence continued always in unobstructed and peaceable operation, the said act of June, 1862, was inapplicable, and conferred no authority in the commissioners, and the defendants' title is void.

3d. That if the President of the U. S. did, after the passage of the said act, and before the first day of July, 1862, by proclamation declare that insurrection existed in that portion of the State of South Carolina called "St. Helena Parish," it was necessarily on the ex parte and, perhaps, interested statement of others, & not upon his own knowl-
33 edge, and as the witnesses and history prove that this portion of the State was taken possession of by the federal forces, and abandoned by the confederates eight months before, and always remained from thence under the authority of the government of the U. S., the said proclamation is not evidence, & in no manner dispenses with the necessity of proving the existence of the condition of things which prevented the execution of the provisions of the act of August, 1861.

4th. That the act of June 7th, 1862, was not intended to confer on the President of the U. S. the power by proclamation to make any State, or portion of any State, insurrectionary, if it were not so in fact; if it was so intended, the said act is unconstitutional.

5th. That the act of June 7th, 1862, is highly penal in its character, and to be construed strictly; nothing is to be taken by implication or intendment. It therefore can apply only to those States, or portions of States, wherein, by reason of insurrection, the civil authority
34 of the government of the United States was obstructed so that the provisions of the act of August, 1861, could not be peaceably executed. If this was not the case in this portion of the State at any time after the 10th day of November, 1861, the sale of lands under it, in March, 1863, was void.

6th. That a direct tax upon the people of any one or more States, for any purpose whatsoever, which bears a greater proportion to the population of the said States than does the direct tax laid upon the people of the other States bears to their population, is not in conformity to the

first art., 3d sec. of the Constitution of the United States, but is unjust & oppressive.

7th. That the act of 7th June, 1862, is not a tax act, but an act of confiscation, inasmuch as the 4th section provides that, for the non-payment of the tax, the title of the land shall become forfeited to the U. S.; and, by the 12th section, the proceeds of sale of the whole, and not merely of so *so* much as may be necessary to pay the tax, shall be paid into the treasury of the U. S., and no part to the owner, which is confiscation; but there can be no confiscation until office found.

7th. That it is in effect an act of attainder for high treason, for it adjudged and condemns all who owned lands in any insurrectionary portion of the State, and makes no distinction between the innocent and guilty, taking from all the right of trial by jury, punishing all by forfeiture. But by the 1st art., 9th sec., 3d par'g'h of the Constitution of the United States, the power to pass a bill of attainder is denied to Congress.

8th. That by the 9th article, s. 2d, of the constitution of the State, "no freeman shall be taken or imprisoned or disseized of his freehold liberties or privileges, or outlawed or exiled, or in any manner destroyed or deprived of his life, liberty, or property, but by the judgement of his peers or the law of the land." And by the 5th article of the amendment to the Constitution of the United States it is further declared that "no person shall be deprived of life, liberty, or property without due process of law;" which means, "a judgement rendered upon the verdict of a jury," or given after due process to answer according to law. But here there has been neither trial nor judgement; & therefore the plaintiff has been unlawfully disseized.

9th. That a statute passed for the purpose of working the wrong of depriving a man of his freehold, &c., is not the law of the land within the meaning of these words. In the Constitution they mean the general law, which hears before it condemns, proceeds upon inquiry, and renders judgment only after trial.

10th. That before any one can be disseized of his freehold or any of his rights, it must be ascertained judicially that he has forfeited them or that some one else has a superior title. His property cannot be taken from him by legislation. The 4 section of the act of 7th June, 1862, which forfeits the lands lying in insurrectionary districts unless the tax (to be fixed by the commissioner without notice to the owner) and a penalty of 50 per cent. are paid within 60 days, is a violation of the Constitution of the United States and can confer no title on one who purchases at a sale made under it.

11th. That whether a citizen has or not incurred a penalty, (which means a punishment for crime,) some violation of law can only be ascertained by trial by jury. If the plaintiff's land, therefore, was sold for the penalty as well as for the tax, tho' the tax may have been legal and regularly imposed, the penalty was not, and the sale is therefore void.

12th. That the commissioners' certificate is only prima facie evidence of the regularity and validity of the sale and of the title of the purchaser, but is not evidence unless preceeded by proof that the land had been legally valued and assessed by persons duly authorized upon the basis prescribed in the 4th paragraph of the 9th sec. of the 1st art. of the Constitution of the United States; that all of the land in the said parish had been listed, and that the land in question was the subject of taxation; that the time of redemption had passed; that the said land was in a portion of the State wherein by reason of

insurrection the civil authority of the government of the United States was so obstructed that on the 7th day of June, 1862, & after, the provision of the act of 1861 could not be peaceably executed.

13th. That due and legal notice of the amount assessed and fixed, and of the time and place of sale, was given by publication through the newspapers and otherwise as required; that the notice of the time
39 and place of sale contained a description of the land, with the name of the owner, a statement of the amount for which it was assessed; and the said land, pursuant to such notice, was publicly sold by three commissioners. Without this the power to sell was not in the commissioners, & their certificate is not prima facie evidence.

14th. That by the statute laws of South Carolina the legal title to lands can only be transferred by deed under the hand and seal of the owner, attested by two or more subscribing witnesses; that even if it were within the constitutional power of Congress to forfeit the lands of the people of a State for any cause, without inquest or office found, it is nevertheless not in its power to give to a mere certificate—which is at most only an equitable title—the effect of a deed. The legal title, therefore, is still in the plaintiff.

40 15th. That the 52 s. of the act of August, 1861, gives the President the power to execute that act so soon as the authority of the government of the United States shall be restored, should any State be in rebellion at the time of its passage, but authority over this portion of the State was restored in November, 1861, and was never again interrupted. The commissioners therefore, in March, 1863, had no authority to execute either law, that of 1861 or 1862.

16th. That it was the right of any owner of land within 60 days next after the tax commissioners had fixed the amount, to pay it into the treasury of the United States, or to the commissioners, but it was also the duty of the assessor, by advertisement in newspapers, and by written notices posted in at least 4 of the most public places in each district, to advertise all persons concerned, where their list of enumeration, valuation, and assessment was to be found, and that during twenty-
41 five days after such publication, appeals would be received. Without such notice no further proceedings could be had, and a sale for payment of a tax, the amount of which the tax-payer had no notice, is void.

17th. That the 4th section of the act of Congress 7 June, 1862, does not & is not intended to create such a forfeiture of the lands to the United States, as that it ipso facto ceases to be the property of the former owner, and becomes the absolute property of the United States.

18th. That Congress has not the constitutional power to impose the forfeiture of land for non-payment of taxes assessed thereon.

19th. That the power of Congress to provide for the sale of land for the payment of the tax is limited to that object, and a law which requires that the whole land shall be sold in all cases without re-
42 gard to the fact that it may be divided without injury to it, and the tax may be paid by a sale of part of it, is unconstitutional.

20th. That the forfeiture declared by act of June, 1862, was qualified and not absolute, and this is made evident by the section of the said act of June, 1862, which provides that abandoned lands taken possession of by the government may be leased during the continuance of the rebellion and until the 4th of March, two years subsequent to the establishment of a loyal State government over the insurrectionary district, and two years after the election of a loyal legislature.

21. That the books offered in evidence by the commissioner are not

such books as the act prescribes to be kept containing a description of the property, and the sale of the commissioners was therefore void.

(Indorsed:) Mary O'Connor vs. Samuel Cooly & Henry G. Judd.

43 Instructions for the jury prayed at the court.

Defendants' request to charge.

MARY O'CONNOR
v.
COOLEY & JUDD. } Trespass to try title.

His honor is respectfully requested to charge as follows:

First. That if the tax sale certificate, "No. 91," purporting to convey "lot E, in block 61," according to the plat of the town of Beaufort, adopted by the United States direct tax commissioners for the district of South Carolina, in evidence, purporting to have been executed at Beaufort, the 13th of March, A. D. 1865, and signed by William Henry Brisbane and W'm E. Wording, commissioners, was executed at the time indicated, it is good and valid in law, notwithstanding it is signed by but two direct tax commissioners.

Second. That said certificate of sale must be received as prima facie evidence of the regularity and validity of said sale, and of the title of the United States to the land described, and the same can only

44 be affected as evidence of the regularity and validity of said sale, by establishing the fact that said property was not subject to taxes, or that the taxes had been paid previous to sale, or that the property had been redeemed according to the provisions of law, and unless the jury find, from the evidence in the case, that said land was not subject to tax, or that the tax had been paid previous to sale, or that said land was redeemed after the sale, by the owner, (plaintiff,) within sixty days, then said certificate must be regarded as conclusive evidence of the title of the United States to said property.

Third. The court, having rejected the first and second requests to charge, is respectfully requested to charge as follows:

1. That, the President of the United States having issued his proclamation on the first day of July, 1862, declaring, among other things, "that the State of South Carolina was in insurrection and rebellion, and by reason thereof the civil authority of the United States was obstructed, so that the provisions of 'an act to provide for increased revenue from imports, to pay interest on the public debt, and for other purposes,' approved August 5th, 1861, cannot be peaceably executed," the lot or parcel of land in plaintiff's declaration mentioned became charged with its respective portion of the direct tax, apportioned

45 to the State of South Carolina by the eighth section of an act approved August 5th, 1861, entitled "An act to provide increased revenue from imports, to pay interest on the public debt, and for other purposes," and the same, togather with a penalty of fifty per cent., became a lien thereon, without any other or further proceeding whatever.

2. That if the direct tax commissioners appointed for the State of South Carolina, consisting of W'm E. Wording, W'm Henry Brisbane, and A. D. Smith, proceeded to Beaufort, South Carolina, in October, 1862, (the commanding general of the forces of the United States having established military authority throughout St. Helena Parish, in which the town of Beaufort is,) and opened their office, and fixed the valuation of said land in plaintiff's declaration mentioned, on the 3rd day of November, 1862, at seven thousand (7,000) dollars, and fixed the amount

of tax at fifty-six (56) dollars, penalty at twenty-eight (28) dollars—total, eighty-four (84) dollars—and the owner of said land (plaintiff) did not within sixty days thereafter pay the said tax thus charged upon the land into the treasury of the United States, or to the commissioners named, then the title of, in, and to said piece or parcel of land became forfeited to the United States.

3. That if (the tax charged upon said lot not having been paid within sixty days after the amount was fixed by the commission-
46 ers) the tax commissioners caused the same to be advertised for sale in a newspaper published in the town of Beaufort, for at least four weeks, commencing Saturday, January 10th, 1863, and by posting notices of said sale in three public places in the town within which said lands are situated, at least four weeks previous to day of sale, and, at the time and place of sale, did cause the same to be sold to the highest bidder, for a sum not less than the taxes, penalty, and costs, and ten per centum per annum interest on said tax, pursuant to said notice, and did bid the said land off for the United States, at a sum not exceeding two-thirds of the assessed value thereof, to wit, one hundred and twenty-five (125) dollars, being the highest bidder therefor, then the title to said land did vest in the United States in fee simple, free and discharged from all prior liens, incumbrances, right, title, and claim wheresoever.

4. That if it appears, from the books of the said direct tax commissioners, kept at the time, in which purports to have been entered "an abstract of land and lots sold in the town of Beaufort, Beaufort district, State of South Carolina," for taxes, under "an act of Congress, 'approved June 7th, 1862,' for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes,"
47 that "lot E, block 61, valued at seven thousand (7,000) dollars, tax fixed at fifty-six (56) dollars, penalty twenty (20) cts., interest at ten per cent., five (5) dollars twenty (20) cents; total, ninety-three (93) dollars forty (40) cents; advertisement and notice of sale, January 10th, 1863, and sold March 13th, 1863, to the United States for one hundred and twenty-five (125) dollars;" and if it appeared, from the testimony, that said "lot E, block 61," is the same land as that in the plaintiff's declaration mentioned, then a sufficient record of the doings of said tax commissioners has been kept, and the same shown, in connexion with the advertisement and notices in evidence, that such proceedings have been had as vests the title to said land in the United States.

5. That if the tax commissioners could obtain no records from which an accurate description of the lots of land in the town of Beaufort, as formerly described, could be made, then, for the purpose of assessment and taxation, and the various provisions of the act under which they were acting, it was competent for them to make a plat of the town and describe the peices and parcels of land by new terms and methods; and if the description adopted by them gives accurate information of the lot of land in question, as valued, assessed, advertised, and sold for
48 non-payment of taxes, then the same is sufficient in law, and, as to it, the sale is valid.

6. That if the property in question was advertised in the manner indicated in the five copies of the "New South," in evidence, as "lot E, block 61; quota of tax, $56 00; penalty, $28 00; amount, $84 00," and the same was posted up in four public places in the town of Beaufort for four successive weeks, then such notice of the sale of the property was given by the tax commissioners as the law requires.

49 But the court rejected each and every of the instructions prayed for by the plaintiff and defendants, except as the same are embraced in the charge hereinafter set forth.

The court then charged the jury as follows:

Gentlemen of the jury: The circuit courts of the United States are called upon in advance of the ultimate tribunal, the Supreme Court of the United States, to decide upon principles of vital importance to the citizens and to the government. They have to do so under many disadvantages. Without that degree of preparation, or opportunity of preparation, which the solution of those great principles so imperatively demands, we are, as it were, like a surgeon on the battle-field, called upon to perform an operation of the most difficult character, to perform it without that deliberation and without those helps which give certainty to the operation and the highest security that the operation will be performed with perfect soundness of procedure, and with such instruments as the difficulty of the case demands. I feel myself in this case, with this burden of duty cast upon me, very much as the conscientious surgeon might feel under circumstances so embarrassing, so oppressive. But with such preparation as we have been able to command, and with supreme devotion to the rightful authority of the government and the just right of the citizen; feeling, I am sure, as acutely
50 for one as for the other, and bound to protect either as far as the constitution and the law permits me to protect either and compels me to protect both, with such ability and with this opportunity, I proceed to the discharge of my duty.

Let me say, in advance, that there are many considerations which press heavily upon our feelings, which appeal most powerfully to our sensibilities, and which may properly be addressed to the legislature of the country, and should, and I trust will, avail with the legislature of the country, that are not for me or you. It is not our province to legeslate for the country; not my or your province to make the law; and we can only so far rightfully govern the country, and decide between the government and the citizen, as the law permits us to do. The judge and jury are here merely the servants and ministers of the law. I trust we will not permit ourselves to believe that to wander from the law, to take the law into our own hands, & of our own will & caprice to set aside the law, is the best way in the long run to serve either the citizen or the government in this case or this class of cases. I would impress upon you confidence in the government. I would do so as a matter of duty on the part of the citizen; I would do so as a matter of policy under the circumstances in which we are placed. It is not rightful nor
51 expedient to disobey the law. We make a great mistake when we suppose we can, with impunity and safety, violate the law. Evasion of law is itself violence; it is anarchy; it is a throwing off all government; it is casting ourselves upon chance. When we permit ourselves to be drifted from that mooring—from the anchorage of law—we do not know where we will bring up; we do not know upon what perilous shore we will be cast; we certainly place ourselves beyond protection of the law; we have no rightful protection.

I would, therefore, in approaching this case, though feeling most acutely that the party who is before us is a helpless woman, yet I am bound to say to you that so far as the legal principles which govern the case are concerned she is simply a citizen, and we are not permitted to make one law for her and another law for another person; but we are to administer the law faithfully and impartially. You are to accept the rulings of him appointed to pronounce the law, and to permit these rul-

ings to be corrected elsewhere. If this law, under the circumstances in which it is to be executed, carries with it cruel hardship, let that hardship go to the legislature of the country. Let the American people in their almost omnipotent strength, their banner and the cause for which so much life and property has been spent having irreversibly triumphed, let the American people through their representatives in Congress
52 be appealed to, and let us trust they will do that which is worthy of the people whose power is almost without limit, that they will exhibit the magnanimity which belongs to strength.

I feel my responsibility in this matter, and shall discharge it in fidelity to the Constitution, and in fidelity to the oath I have taken to administer it.

This is an action of quare clausum fregit, in which the plaintiff avers that a trespass has been commited on her land, and seeks by this remedy to obtain the land which she avers to be hers, and damages for the detention of it.

The defendants, on the other hand, deny that they committed any such trespass, but that the land in question, the house and lot in the town of Beaufort, parish of St. Helena, which had belonged to Mrs. Mary O'Connor, was divested out of her, and vested in the United States (under whom they claim) by a sale under the act of Congress of 1862.

The section under which it is claimed that sale was effected and title passed to the United States, was the 4th section of the act of 1862, entitled "An act for the collection of direct taxes in insurrectionary districts," &c., as follows:

"That the title of, in, and to each and every piece or parcel of land upon which said tax has not been paid as above provided, shall thereupon become forfeited to the United States; and upon the sale
53 hereinafter provided for shall vest in the United States or in the purchasers at such sale, in fee-simple, free and discharged from all prior liens, incumbrances, right, title, and claim whatsoever."

I have ruled that the title made to the United States, signed by but two of the direct tax commissioners, instead of three, so far as the paper title is concerned, is an invalid title, is defective. It has been cast upon the government of the United States to show that all the proceedings necessary to give title to the United States, irrespective of that paper title, have been complied with: that is, that the law of 1862, in all its sections, shall have been complied with.

This proceeding is based upon the act of Congress of June 7th, 1862, entitled "An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes."

The judge then read the first, second, third, fourth, fifth, sixth, and seventh sections of the above act.

Mr. HENEREY, foreman of the jury. Will your honor be pleased to read what is evidence of title?

JUDGE. The purchaser, "upon payment, &c., shall be entitled to receive from said commissioners their certificates of sale, which certificate should be received as evidence of the regularity and validity of
54 the sale and of the title of the purchaser," &c. The certificate is the proof, but I have ruled the certificate in this case as invalid and defective. I have cast upon the defendant, the United States, the onus of proof that they complied with all the provisions of the act; that is, that they shall have given due notice by advertisement, had made an assessment and valuation, and had done everything necessary to the validity of the title.

(The judge then read the fourteenth section of the act of 1862 relative

to books to be kept by the commissioners, descriptions of property to be sold, &c.)

The first point that must be made out to you in this case, and the point made by the counsel for the plaintiff, is that which concerns the application of this act, or the jurisdiction of the court under this act, to this case. It is contended here by the plaintiffs that the laws of the United States in this territory could have been executed, and the tax commissioners had no jurisdiction and no right to exercise any authority in the premises, as under the 6th section of the act of 7th June, '62, accuring only whenever the commanding general of the forces of the United States entering into such insurrectionary State or district shall have established the military authority of the United States, throughout any parish or district, or county of the same, and they shall open one or more offices for the transaction of business, irrespective of the military authority. That is the point made by plaintiff as I understand it. You observe that the law itself takes for granted that without the
55 aid of the military the law could not have been executed. The only authority that did and could exist there was the military authority. It certainly cannot be contended here that there was any other authority, or that any other authority could be maintained except mere military authority. The rebellion was all around it. The parish of St. Helena was nothing but a fort occupied by the military. The moment the federal forces retired the rebellion would have closed right in. It was surrounded by insurrection, and the only authority that prevailed there was military authority. Nothing but the soldier on the soil could have maintained the authority of the United States. The law has reference to just such a condition of things. It has been stated that the inhabitants there were loyal citizens. I have no doubt that the inhabitants were loyal; but the colored people there were not citizens. It was some time afterwards that they became free by the proclamation of President Lincoln. The citizens at that time were not in the parish; they were in arms under the confederate government. But the point I address to you is that this was simply military occupation, and the moment the military left the State had unlimited sway. It was the only spot in the State where the United States had any control, and that was military control. It was precisely the condition of things prescribed by the act, wherever the United States forces took possession. I
56 therefore think, as far as this objection is concerned, it is really without any substance or form. I therefore say that the commissioners were rightfully there, simply because the military authority had been established by the United States in that parish, and because no other authority than the military would have been permitted to remain there.

It was the duty of these commissioners when they went there to ascertain the value of the property, and all the property there; to charge it with the proper tax; and after sixty days, and notice of sale, to sell such property on which the taxes were not paid.

I have no doubt that these commissioners, under the circumstances, acted in good faith to ascertain the value of this property. In this particular quistion I believe it is admitted that they acted in good faith, because they assessed the property at its proper value. So far as the assessment is concerned there was no wrong done to the citizen. The commissioners did comply in that particular with the act. Another question for us to determin is whether the advertisement of the sale of the plaintiff's land in this case really was such advertisement as the law required; whether it was an advertisement that gave notice to the

owner. It is the settled law that all those conditions must be strictly observed which are necessary and intended for the protection of the owner in all cases where a citizen is compelled by the government to
57 part with his property; where there is coercion used to take the property of the citizen, that everything that affects him favorably shall be strictly maintained; that when his property shall be taken from him those charged with the execution of any statute which takes the property from him shall discharge their duty in good faith and in such a manner as to maintain his rights in the premises. Now, the question is whether this advertisement, this notice, such as has been spread out before you, is such a notice as to advertise the owner that his property was to be sold.

This question seems to me to be a mixed question of law and fact. I shall never shrink from my duty if I know it, and I greatly prefer to take the responsibility than to cast it upon others. What is decided by the verdict of a jury may not be so accurately ascertained. The jury may decide upon a ground that does not enter into the case. But when the judge takes the responsibility his ruling may be measured and valued, and determined to be law or not law. I therefore prefer, though on this matter of mixed law and fact the jury might well be supposed to have jurisdiction, to say to you that I cannot regard this notice as such legal notice or advertisement. This advertisement does not state that the whole town of Beaufort was to be sold. If it stated that, a person seeing the advertisement would indirectly know, or be informed
58 that their lot was included, and they were bound to see what this notice meant. But it does not so state. It does not give notice, either directly or by implication; that is, inevitable notice, so as to make the owner aware that his particular property has been assessed and is up for sale. It is not such a notice as the law requires. I think it is no wrong to the government, but it was due to the citizen, when a law was executed under the circumstances that this law was, that substantial notice should have been given to the citizen. But in truth a notice published within military lines, is as it were a notice only in a fortified camp. That notice, in point of fact, could not be well supposed to reach the citizen.

But it may be justly replied, as a matter of law, that the citizen ought to have been there, and he cannot take advantage of his own wrong. It was his duty to have been there. The facts of this case, as far as duty is concerned, are before you; that is, the whole town fled in terror before the powerful army and navy of the United States. When that magnificent fleet thundered on our shores the terror-stricken inhabitants, men, women, and children, (certainly the women,) fled in dismay. They left the country, and got away as they well might.

This state of things—going still further back in legal contemplation—this state of things is one for which our own people were respon-
59 sible. In a governmental point of view they cannot shift the responsibility. As I said before, this is a peculiar case of hardship, as bearing on the case of a woman and a widow. But I hold in point of law, not dealing with this as a matter of hardship, but as a strictly legal question, that this notice was not such a notice as the law demands. It did not advertise the party that his property was to be sold.

If it had said the whole town of Beaufort was to be sold, and that owners could refer to the plat or map, it might have been notice. The district attorney, in his very able and ingenious handling of this matter, by way of analogy and vindication of this notice of the commissioners, refered to the sale of public lands. I think the analogy is more plausi-

ble than sound. The lands sold in such a case belong wholly to the government, and were sold in reference to the only description possible. They had not previously been broken into parcels and owned by different people. They had no several previous bounds, history, ownership, or identity, & upon their sale no previous owner had to be advertised of the sale, that his rights might be protected. The advertisement was sufficient for the purchaser, as it enabled him to make proper inquiry, and ascertain definitely what he was about to purchase, and the seller and the purchaser were the only parties concerned. As I said be-
60 fore, if the whole town of Beaufort was up for sale, and by blocks and squares, a person was advertised that his house was in that block or square, somewhere described by a particular figure and letter, then it would be his duty to make inquiry. But neither directly, or indirectly, by necessary implication, is this notice such as the law requires, and finds no support or vindication in the supposed analogy of the sale of the public lands. As we go along we may say that the commissioners were rightfully there; that they proceeded in all good faith to ascertain the value of those lots, and fixed their boundries according to this plat, and did what they thought best under the circumstances. I think we may take it for granted that they acted in good faith in reference to the administration of their offices. In reference to some of the property sold in this parish, they did point to the special property to be sold; you will see they named the plantations of Daniel Pope, of Hamilton Fripp, Cherry Hills and Orange Grove. They state the islands upon which those places are. That was an approximattion to a notice given in that way. I only mention those to show they did what to them seemed best under the circumstances, in the necessary discharge of their duty. I have no idea that in anything they did they acted in any sense
61 as conspirators to defraud the people, or wantonly to inflict hardships upon them.

The great point made in this case by counsel for plaintiffs is that it was not competent for the United States in the collection of taxes to do what has been done here, under the fourth section of the act of Congress of June 7th, 1862. After a painful and most conscientious examination of this case, with the advisement given me by counsel for the plaintiff and the government, I have come to the conclusion that I am not permitted to charge you that the government had no such right. This is a proceeding for the collection of a tax and for the enforcement of that collection. The counsel for plaintiff contend that the property of the citizen cannot be divested, the title taken from him and vested in the United States, without "office found;" that is, without judicial proceedings and the intervention of a judge and jury. I have not come to that conclusion, but the reverse, so far as this case is concerned, or so far as the discharge of my duty is concerned and maintainance of the rightful authority of the government. It is my judgment, gentlemen, where the law on its face declares clearly and explicety the disposition and appropriation of property, then the title does so vest in the government; then "office found," or the interposition of judge
62 and jury, is dispensed with. This case comes within the class of forfeitures for non-payment of taxes, and the statute of 1862 divests and vests; that is, it declares a forfeiture of the land, and upon a certain proceeding, under certain conditions, it is declared that the land shall vest in the United States, or in the purchaser in fee-simple, free and discharged from all debts or incumbrances whatsoever. The language of the act is, "That the title of, in, and to each and every piece or parcel of land upon which said tax has not been paid, as above

provided, shall thereupon become forfeited to the United States, and upon the sale hereinafter provided for shall vest in the United States, or in the purchaser at such sale in fee-simple, free and discharged from all prior liens, incumbrances, right, title, and claim whatsoever."

In this act, therefore, there is a divestiture which results from forfeiture, and an investiture which results from the act of sale. On the act of sale the property vests.

The judgment that I have announced finds its sanction and authority in the cases of Fairfax's Devisee of Hunter, 9 Cranch, 603; the United States vs. Repentigny; and in the recent case of Bennett vs. Hunter, by the Supreme Court of the United States.

In the case of Fairfax's Devisee, in the very paragraph of the
63 opinion delivered by Mr. Justice Story, in which the exceeding value of the process of "office found" is insisted upon, to guard and fix the rights of citizens and government, it is admitted by way of qualification, "The common law, therefore, ought not to be deemed repealed unless the language of a statute be clear and explicit for this purpose."

And in the case of the United States v. Repentigny, 5 Wallace, p. 268, it is declared that "a legislative act directing the possession and appriation of the land is equivalent to office found."

These conditions are perfectly met and satisfied by the act of '62; the language is clear and explicit, leaving no possible doubt that upon the sale provided for in the act, that the land shall vest in the United States, or in the purchasers in fee-simple.

The object of the legal proceedings which are involved in the phrase "office found," which takes place when land is forfeited to the crown (in this country, the people,) because of crime or want of heritable blood, is to ascertain and legally determine the right or claim of the government to the land which before rested only as a right or claim, undetermined and unascertained. It was to establish the right, and couple the right with the possession; in other words, it was to ascertain and complete the right to the land with the possession of it,
64 and thus make a complete title in the government. As, in the cases just cited, the title of the people or crown was not completed till office found, so here, the title of the government under this act was not complete and absolute till the sale. It was complete in the government when, in the alternative, it was complete in a private purchaser; in the language of the act, "upon the sale hereinafter provided for shall vest in the United States, or in the purchaser at such sale in fee-simple," &c. It cannot be questioned that the legislative act in this case directs the possession and appropriation of the land to the private purchaser, upon sale, in unmistakable terms; and as his title would have been absolute, so here, and at the same juncture, the title of the government as purchaser would have been equally clear. The rights of the one, under the same circumstances, are made the same with the other, and interpret and interchangably measure each other.

I would, gentlemen, impress upon your attention that the power exerted by Congress in this act is for the enforcement of a tax, and that the taxing power is unlimited. The sale is simply to make good the tax; and this procedure, and the authority asserted for the government by the act of '62, sec. 4, has been, and is, very common now in many
65 of our States, (among them, Virginia,) and by peoples the most jealous of their liberties, who hold all power substantially in their own hands, (not trusting even their judges with but short terms of administration,) and make and unmake their rulers, who are their servants,

at pleasure. What is enacted to be done, therefore, by the act of '62 is not against the usage of our country, the practice of our legislatures, or offensive to the sense of our peoples, who are omnipotent over their constitutions, their laws, and their servants, and absolutely free in even the highest sense. But the contrary way will be declared in point of law and in fact to be the "law of the land;" and it is my instruction to you, gentlemen, (and especially as connected with the exercise of the taxing power,) that it was competent for Congress to do what it enjoined to be done by the act of '62, and that "office found" was not necessary to vest the property here in question in the government, or any other purchaser.

FOREMAN OF THE JURY. "I desire to ask whether, in order to get equivalent to office found, the commissioners are not required to perform their duty specifically? The authorities read by your honor tend to show that property could be taken from the owner when the owner
66 does not perform his or her duty to the government?"

JUDGE. "The act prescribes the mode by which the taxes should be collected. Various acts of legislatures prescribe different modes and different penalties; but in all the person who undertakes to carry out the authority must comply strictly with that authority. In this case, for instance, the commissioners must comply with the authority given them. It is for you to determine (under my rulings) whether these commissioners have complied with the law in all its parts."

To the granting of which said instructions, and to the refusal of those prayed for by the plaintiff and defendants, the plaintiffs and defendants then and there, and before the jury had withdrawn from the bar, did except; and inasmuch as the matters aforesaid do not appear by the verdict of the jury, prayed the court here to sign and seal this their bill of exceptions, which is accordingly done this sixth (6) day of May, A. D. 1870.

GEO. T. BRYAN,
U. S. Judge Dist. S. C.

67 THE UNITED STATES OF AMERICA,
District of South Carolina, in the Fourth Circuit:

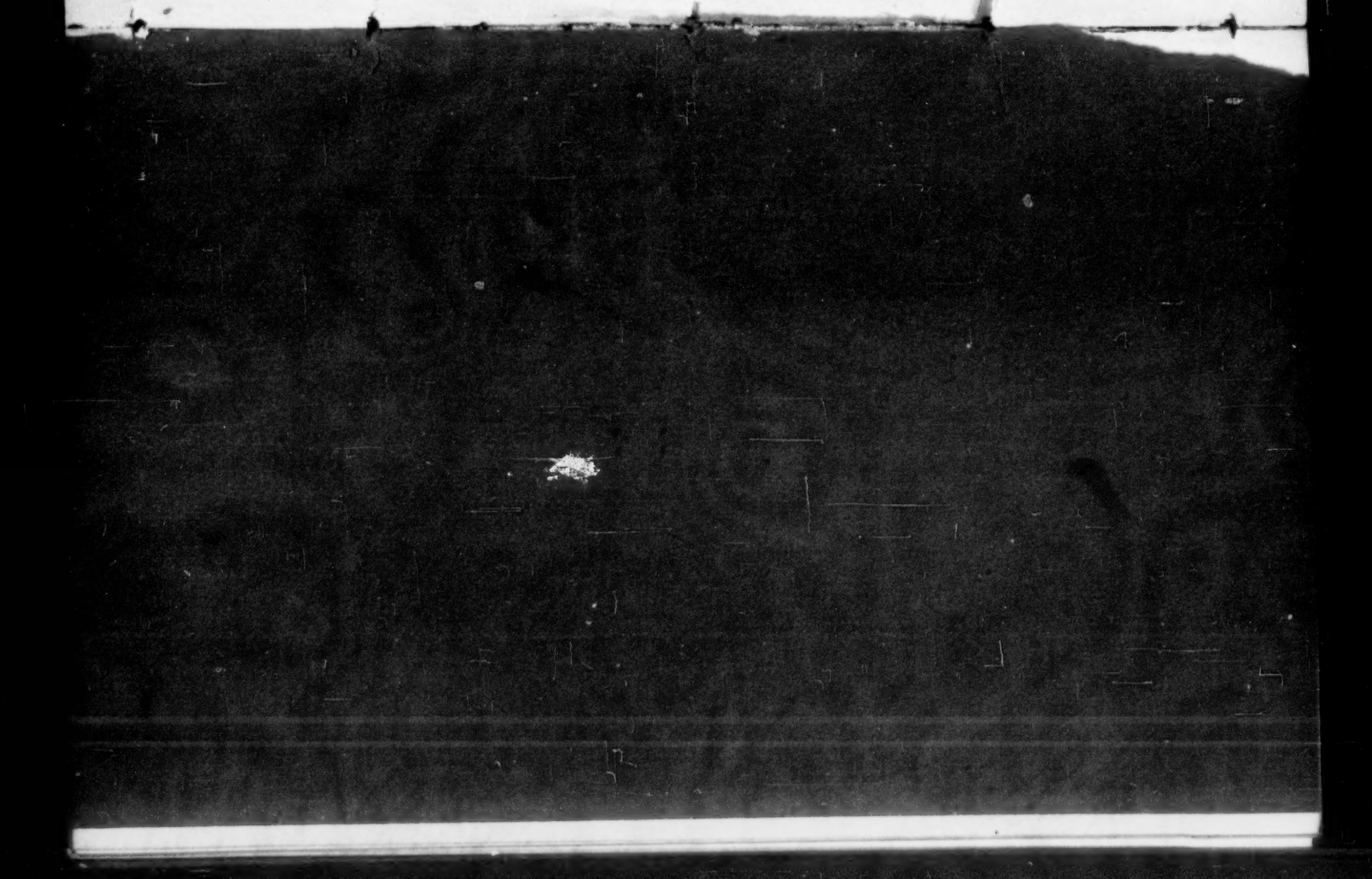
I, Daniel Horlbeck, clerk of the circuit court of the United States within and for the district of South Carolina, do hereby certify the above and foregoing, from page 1 to page sixty-seven, inclusive, to be a true and complete transcript of the record of all the proceedings which have been had in the cause in said court wherein Mary O'Connor is plaintiff and Samuel A. Cooley and Henry G. Judd are defendants, as appears from the records of said court now remaining in my custody, and that the original writ of error and citation herein by the plaintiffs in error are included in and constitute the first, second, and third pages of said transcript.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in the city of Charleston, in said district of South Carolina, this twenty-ninth day of June, A. D. 1870.

[SEAL.] DAN'L HORLBECK,
C. C. C. U. S., for S. C.

(Here follows map marked page 68.)

(Indorsement on cover:) No. 468. Samuel A. Cooley and Henry G. Judd, plaintiffs in error, vs. Mary O'Connor. S. Carolina C. C. U. S. Filed 22d July, 1870.



Supreme Court of the United States.

SAMUEL A. COOLEY and HENRY G. JUDD, Plaintiffs in Error.

vs.

MARY O'CONNOR.

No. 236.

BRIEF OF DEFENDANTS IN ERROR.

This suit was instituted in the circuit court, to determine the title to the real estate mentioned in the pleadings. The question was whether the title of the plaintiff below was divested by the tax sale proved in evidence. The verdict below was for the then plaintiff, and declared the tax sale invalid.

1. The first exception was in regard to the ruling of the court in reference to tax sale certificate, which was objected to by the plaintiff, "on the ground that it was signed by only two commissioners," which objection was sustained by the court, to which ruling the defendants below excepted.

There was no error in this ruling, for the following reasons:

(*a*) The tax certificate was signed by only two of the three commissioners.

The correct principle on this point is laid down by Mr. Justice Miller, in the case of Schenck *v.* Peay *et al.*, (1869,) circuit court, east district of Arkansas. (Pamphlet Report, p. 6.)

"Where an authority of this kind is conferred on three

or more persons, in order to make the exercise of that authority valid, all must act so far as to be present, and take part in the proceedings, although some may dissent from the action determined on; or, at least, all must have an opportunity to participate."

"The action of two out of three commissioners, to all of whom was confided a power to be exercised, cannot be upheld, when the third commissioner took no part in the transaction, and was ignorant of what was done—when he gave no implied consent to the action of the other." (*Idem.*, p. 6.)

See further on this point—

2 Kent's Comm., sec. 193, p. 337, 7th Am. ed., note A, and sec. 633, p. 813, note A.
Commonwealth *v.* Canal Commrs., 9 Watts, 466.
Green *v.* Miller, 6 Johns. R., 38.

The act of March 3, 1865, (13 Stats. at Large, p. 502,) which gives the majority of a board power to transact all business, is not restrospective. Per Mr. Justice Miller. (Schenck *v.* Peay *et al.*, Pamphlet R., p. 7.)

(*b*) The certificate of sale, if admitted, would have been only *prima facie* evidence, because the proviso at the end of 7th section of the act of June 7, 1862, was repealed by section 6 of the resolution of February 25, 1867, (14 U. S. Stats., p. 568,) and the certificate is made only *prima facie* evidence. The certificate was offered as conclusive evidence of the regularity of the sale, and the judge below properly refused to receive it as such.

(*c*) The act of 1862 does not provide for a certificate when the land is bid in by the United States.

Practically, except upon the theory that the certificate was conclusive of the regularity of the sale, no injury was done to the defendants below by refusing to receive the certificate, as the defendants could have recovered if their own evidence had not shown that the sale was void, by reason of failure in the tax commissioners to pursue the requirements of the law in the sale.

The next ground of exception taken by the plaintiffs in error is, in the failure of the judge below to give certain instructions which they submitted. Those rejected instructions are six in number, and are set forth at pages 16 and 17 of the printed transcript:

1. This instruction required the judge to charge that the certificate of sale, signed by only two of the three commissioners, was good and valid.

This instruction, for the reasons already given, the judge properly refused to give.

2. This instruction assumed that the certificate of sale was conclusive evidence of the title of defendants.

This instruction, in view of the repeal of the proviso in the 7th section of the act of 1862 by the resolution of February, 1867, already cited, the court properly refused.

3. The first branch of this instruction was, that the tax due, together with the penalty, was a lien on the land mentioned in the pleadings. This instruction was immaterial, and was therefore properly refused. Besides, if at all material, its materiality was superseded by the subsequent charge of the court.

The second branch of this instruction required the court to charge, that the non-payment of the tax, for which the land was charged, operated to cause a forfeiture of the land in controversy to the United States. This instruction was immaterial, because the issue was, whether the title had vested in the United States.

The title only becomes vested in the United States upon sale.

Bennett *v.* Hunter, 9 Wall., 336.

The court, therefore, were not bound to give this instruction.

The third, fourth, fifth, and seventh branches of this instruction required the court, in effect, to charge that, upon the evidence submitted by defendants, they had conclusively, as matter of law, established the validity of the

tax sale. These instructions the court very properly declined to give.

We submit, then, that the court committed no error in refusing to instruct the jury as prayed by the defendant's below.

3. As to the exceptions taken to the entire charge of the court by the defendants below, we submit it has no legal effect as an exception.

If a series of instructions be excepted to in mass, if any are good the excepted must be overruled.

Rogers *v.* The Marshal, 1 Wallace, 654.
Johnston *v.* Jones, 1 Black, 220.
Harvey *v.* Tyler, 2 Wallace, 328.

4. It is not error to refuse the instructions asked, provided those given cover the case.

Laber *v.* Cooper, 7 Wallace, 566.
Mills *v.* Smith, 8 Wallace, 27.

5. If instructions are wrong, (which we deny,) yet if it appears that plaintiff cannot recover, the case will not be sent back.

We propose now to show that the tax title set up in this case cannot be sustained, and, therefore, it would be idle to send the case back.

I submit, as a preliminary proposition—

1. That, to support a tax sale, it must be proved that everything necessary to authorize the sale was done.

To sustain a tax title, it must be shown affirmatively that every substantial requisite of the law has been complied with.

Lyon *v.* Hunt, 11 Ala., 295.
Reeds *v.* Morton, 9 Missouri, 878.
Turney *v.* Yeoman, 16 Ohio, 24.
Brown *v.* Veazie, 25 Maine, 12 Shep., 359.
Judevine *v.* Jackson, 18 Vermont, 3 Washb., 470.

Scott *v.* Detroit Young Men's Society, 1 Doug., 119, (Michigan.)
Sharp *v.* Speir, 4 Hill, 76.
Sharp *v.* Johnson, 4 Hill, 92.
Foust *v.* Ross, 1 Watts & Serg., 501.
Garrett *v.* Doe, 1 Scam., 355, (Illinois.)
Williams *v.* The State, 6 Black, 36.
Roukendorf *v.* Taylor's Lessee, 4 Peters, 349.
Stead's Executors *v.* Course, 4 Cranch, 403.
Williams *v.* Peyton's Lessee, 4 Wheat., 77.
Thatcher *et al. v.* Powell, 6 Wheat., 119.
Williams *v.* Peyton, 2 Wheat., 77.
Blackwell on Tax Titles, pp. 33, 50, 71, 74, 251.
Brown *v.* Veazie, 25 Maine, 362.

Where unimproved lands of non-resident proprietors in Maine are sold for taxes, the names of the owners, if known, must be stated in the notice of sale.

Treat *v.* Orono, 26 Maine, (13 Shep.) 217.

All provisions for security for citizens, to enable each to know for what real estate he is taxed, are essential, and must be observed.

Cooley's Constitutional Lim., pp. 77, 531, and note 3.

2. The sale in this case vitiated, because the penalty exacted at the time of assessing the tax.

The commissioners acted illegally in assessing the penalty of 50 per cent. at the time tax assessed.

Per Judge Cauldwell, in Schenck *v.* Peay *et al.*, Pamphlet R., p. 31.

The 31st section of the act of June 7, 1862, authorizes party to pay "*the tax*" in sixty days. The penalty is not mentioned in the section. (*Id.*) No reason for the penalty when the tax assessed. (*Id.*) The penalty was to take effect after default made in the payment of the tax. The 3d and 7th sections taken together prove this. (*Id.*) A different construction would make the tax unconstitutional,

as being 50 per cent. in excess of the "apportionment according to their respective numbers." (*Id.*, 33.)

If an act of Congress admits of two constructions, one unconstitutional, the other not, the first to be adopted.

United States *v.* Combs, 12 Peters, 72.

Ex parte Milligan, 4 Wallace, 120.

Assessment of the penalty at time of assessing the tax avoids the tax sale. Any other construction would put it in the power of tax collectors to coerce any amount of illegal taxes. (*Id.*, 36.)

See also Cooley on Const. Lim., p. 520.

Blackwell on Tax Titles, 154.

See further Clarke *v.* Strickland, 2 Curtis C. C. R., 443.

"Stating in the advertisement a false amount of tax is equivalent to giving no notice." (*Id.*, 443.)

3. The act of June 7, 1862, is illegal, as it makes no provision for demand upon the tax-payer, or for notice to him of the fact that the amount of taxes are fixed, or when fixed, or where the officer is, or that he has opened an office.

4. The advertisement in this case is insufficient, and vitiates the sale.

Such description must be given "as will enable owners to know that the lands advertised are theirs."

Brown *v.* Veazie, 25 Maine, 362.

Tallman *v.* White, 2 Comstock, 66.

Dike *v.* Lewis, 2 Denio, 237.

In describing the land, the collector, in his advertisement, must give a particular and certain description, so that the owner may know that it is his land.

Blackwell on Tax Titles, p. 226, and authorities cited in note 5; also pp. 226, 227, 228, 229, 230, 233.

5. The direct tax under which the land in this case was

sold was illegal, so far it exacts a tax for the time the town of Beaufort was in the occupation of the Confederates.

Case of Georgiana & Lizzie Thompson, 9 Opinions Attorneys General, p. 140.
United States *v.* Rice, 4 Wheat., 254.
United States *v.* Hayward, 2 Gallison, 502.
United States *v.* Arnold, 1 Gallison, 348.
31 Hogheads Sugar, 9 Cranch, 191.
United States *v.* Vowell, 5 Cranch, 368.
The Follina, Dodson's Ad. R., 450.
Grotius, J. & B., b. 3, c. 6, s. 4.
Puffendorf, by Barbeyrac, l. 7, c. 7, s. 5.
Bynkershoek, 2 J. Pub., l. 1, c. 6, 16.
Halleck's Int. Law, p. 780, s. 4.
Mrs. Alexander's Cotton, 2 Wall., 404.
United States *v.* The Hammett, 4 Best. & Mo., 486.
The Hiawatha, Bl. Pr. Cases, 1.
The Hiawatha, 2 Black., 635.
The Mary Clinton, Bl. Pr. Cases, 536.

"The seceded states and their inhabitants, during the prosecution of the war by them, are regarded as enemies of the United States, and neither in relation to the doctrines of public law nor the relevancy of municipal regulations are they within territories under the dominion of the laws of the United States."

The Sarah Star, Blatchford's P. Cases, 81.

Speaking in reference to the act of Congress of July 13, 1861, (12 Stats., 255,) the judge says: "Obviously these regulations are sovereign in character, and essentially municipal, and intended to be limited in operation to the territorial authority of the Government over property within that authority." (*Id.*, 82.)

W. W. Boyce,
Counsel for Defendants in Error.

SAMUEL A. COOLEY & HENRY G. JUDD,
Plaintiffs in Error,

versus

MARY O'CONNOR, Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE UNITED STATES.

STATEMENT OF FACTS AND ARGUMENT.

Michael O'Connor, a citizen of the United States, residing at Beaufort, in the State of South Carolina, on the 24th day of April, 1827, purchased the lot in question, which is described as measuring sixty-five (65) feet in front on Bay street, by one hundred and seventy-five (175) feet in depth. Bounded North by Bay street; South by the river, and East and West by lands of

Mr. O'Connor was owner in fee simple of the premises, and remained in possession from the date of his purchase, to the

day of his death, on the 6th of June, 1850. By his last will he devised the premises to his widow, Mary O'Connor, and she, as devisee, continued in possession until the 12th of November, 1861, when in consequence of the naval bombardment of Port Royal, and being informed that the Confederate commander, then at Beaufort, had ordered all the citizens to leave Beaufort, she left the town, proceeded to Charleston, and thence to Columbia, in which last place she resided until the close of the war. She left upon her premises in Beaufort personal property, consisting of household furniture to the value of $2,000. Mrs. O'Connor, the defendant in error, never voluntarily aided the rebellion.

On the 5th of August, 1861, the Congress of the United States passed an act "to provide increased revenue from imports, to pay interest on the public debt and for other purposes," and thereby imposed upon South Carolina, as her quota, three hundred and sixty-three thousand, five hundred and seventy and two-third dollars. This tax was to be assessed on the value of all real estate at its rate of value on the 1st of April, 1862. On or about the 11th of November, 1861, the United States forces occupied the town of Beaufort, South Carolina, and restored the authority of the Government over the entire district or parish wherein the town was located. From that moment the insurrection or rebellion in this part of the State was completely overthrown, the inhabitants of the place were all loyal, and in accord with the Government, whose laws and authority had unobstructed operation and sway. A collector of customs

was appointed, also a postmaster and other civil officers of the Government, who regularly discharged the duties of their offices. All of the regulations and instructions for the assessors and their assistants, as provided for in the act of August 5th, 1861, could have been enforced in the district or parish, if they had chosen, even before the 1st of April, 1862, when it became their duty to make their assessments. In the parish of St. Helena, district of Beaufort, no action was taken, and no attempt made to enforce the act of August, 1861.

On the 7th of June, 1862, Congress found it necessary to pass another act, which provided, "when in any State or Territory, or in any portion of any State or Territory, by reason of insurrection or rebellion, the civil authority of the Government of the United States is obstructed, so that the provisions of the act approved 5th of August, 1861, for assessing, levying and collecting the direct taxes therein mentioned cannot be peaceably executed, the said direct taxes, by said act apportioned among the several States and Territories respectively, shall be apportioned and charged in each State and Territory or part thereof, wherein the civil authority is thus obstructed, upon all the lands and lots of ground therein respectively situated, except such as are exempt by any law of the State or United States, as the said lands were enumerated and valued under the last assessment and valuation thereof, made under the authority of said State or Territory previous to the first day of January, 1861, &c.

Vide 12th Statutes, 422.

Section 2 provides, that the President shall, by proclamation, declare in what States and parts of States, said insurrection exists, &c.

Section 4 provides, that the title of, in and to, each and every piece or parcel of land upon which said tax has not been paid as above provided, shall thereupon become forfeited to the United States, and upon the sale hereinafter provided for, shall vest in the United States, or the purchasers at such sale, in fee simple, free and discharged from all prior liens, incumbrances, right, title and claim whatsoever.

Section 5 directs the President to appoint three commissioners to execute its provisions. The remaining sections mainly define the duties of the commissioners and the regulations to be observed by them in the execution of the law.

Smith, Wording and Brisbane, the three commissioners appointed by the President under this law, arrived at Beaufort in November, 1862, and after vainly searching for assessment rolls, having before them an old plat of the town, which designated the streets, numbers of lots, and names of owners, without taking any evidence whatsoever, or seeking information from the inhabitants, they proceeded to survey and map out the town anew, after their own fashion; and by this new plat, incomprehensible to every one save themselves, they advertised every lot in the town of Beaufort, and in January, 1863, commenced to sell, adjourning their sales from day to day, until the 13th of March, 1863, when the property of Mrs. O'Connor, the defendant in error, was sold, and bid in by the commissioners for the Government,

for the sum of one hundred and twenty-five dollars. The commissioners issued no certificate for this sale until the 13th of March, 1865, after one of the three commissioners had retired, and the certificate was only signed by two of them. Two months after the issuance of this certificate, Mrs. O'Connor, the defendant in error, availing herself of the very first opportunity, repaired to Beaufort to occupy her home. She found it in the possession of strangers. For the first time, then, she was apprised that it had been subjected to a tax by the Government, and had been advertised and sold for taxes. This was the first notice she had ever received. She sought to obtain possession of her house; she was told by those who held, as well as by the commissioners, that the time for redemption had passed.

On the 27th of January, 1864, a year and more prior to the date of the certificate issued by them, the commissioners sold the premises in question to Col. Moore, of the 47th New York Regiment of Volunteers, for $7,500, and one-fourth of the amount, $1,875, in cash, was paid to the commissioners, and by them turned over to the Treasury, as the proceeds of this one house. The total tax penalty and costs against this one piece of property amounted to but $93.40. The remaining three-fourths of the purchase money not being paid when it matured, in 1867, the property lapsed to the Government. It appears by the returns, that the amount raised from this one district, or parish, in South Carolina, exceeded the whole quota the State had to furnish under the act of August 5th, 1861. The questions made

in the case, and the rulings of the Court to which exceptions were taken at the time by both plaintiff and defendant in the cause, may be compressed into the following propositions:

1. Did not the plea of the general issue by the defendants on circuit, preclude them from introducing evidence of title in another, which should have been specially pleaded to be entitled to proof?

2. Was the act of 1862 operative in parts of a State, not in insurrection or rebellion against the Government, and in which the act of 1861 could have been enforced?

3. Had the President the right, under the Constitution and the law of 1862, to declare the whole of a State in insurrection, when a portion of it was not in rebellion?

4. Did the forfeiture and divestiture of the title of the defendant in error take place before or after sale by the Government?

5. Could title to the land vest in the Government before sale?

6. Was the sale a valid sale, if not regulated in compliance with the law?

7. Was the forfeiture, imposed upon the delinquent by the fourth section of the act of 1862, qualified or absolute?

First Proposition.

It is a well settled rule of law that in an action of trespass to try title, the defendant cannot justify under plea of

the general issue. In trespass to try title, any matter done by virtue of a warrant should be specially pleaded. A mere license to enter and occupy a close, cannot be given in evidence under the general issue in an action of trespass to try title.

Vide 1 Cranch, 33; Jones v. Buzzard; Hemphill, Penn. 259; Rhodes v. Burch, et al., 3 McCord's S. C. R., p. 66; Gambling v. Prince, 2nd Nott & McCord, S. C. R., 138.

Second Proposition.

The act of August, 1861, passed exclusively to raise revenue, and which is unexceptionable as a constiutional statute, was not to go into operation until the 1st of April, 1862. The duties devolved by this act upon the assessors, and the whole machinery of its operation, were by its terms deferred until then. When it began to operate, there was no obstruction to its peaceable execution in Beaufort, where the land in question is situate, and the humane provisions of this law could at any time thereafter have been enforced to the full accomplishment of the ends of the Government. It was the duty of those charged with the execution of this law, to enforce it where it could peaceably be done in the interest both of the citizen and of the Government. When this law became operative, the civil authority of the Government was in unrestricted exercise at Beaufort, and unquestioned by the native inhabitants of the place, who were loyal to its dominion. The act of 1862, even if its objects were

not so clearly defined as they are, could not, by any forced or latitudinarian construction, be made to apply to those States or parts of States that were not in insurrection at the time of its passage. This act was supplemental and auxiliary to the act of 1861, and intended more effectually to secure its objects, of collecting from each State its due proportion of a common tax, raised to meet the public necessities. But its object is not left to inference; it is expressed, and expressed so clearly, that one may run and read it, as appears by the very first section. It was not in the power of the President, or any other officer, to give to this law a wider application than it called for, no more than to make or substitute a new law in its stead; more especially as it is a law penal in its character, and harsh in its consequences, it should be strictly construed, and confined in its operation within the express boundaries of its jurisdiction. Mark, the President is not directed to declare what States, but what States and parts of States were in insurrection; so that if but a single county of a State remained loyal, or having faltered, was restored to its allegiance, it was the duty of the President to declare only so much of the State as actually was in insurrection, and exclude the rest. It was his duty to ascertain in what States or parts of States the authority of the Government was unobstructed, and wherein its laws could be peaceably enforced, and such he was bound to exempt in his proclamation. The bare proclamation carried with it no intrinsic evidence of the truth of the declaration that the whole of South Carolina was in insurrection,

when it was not. Nor can it help the case, by assuming that the President was led into error.

The act of 1862, as to the district wherein the land in question is situate, is a dead letter, and nothing done under it in respect to that locality has any efficacy whatever. But it has been said that Beaufort was surrounded by insurrection. Such was not the case. It may have been liable to invasion by the Confederates; but liable to insurrection it could not be, for the remaining inhabitants were all loyal. Washington, the capital of the nation, was for a long time threatened with invasion from the South, but it could not be pretended that it was threatened or liable to insurrection. When the authority of the Government was reinstated in New Orleans, no attempt was made to enforce the provisions of the law of 1862; neither the President's proclamation nor the acts of the commissioners, done under this law, have any validity as to the district or parish in which Beaufort is situated; nor can the defendants justify their holding under this law. Where a party claims title under a public law, he is not only bound to know the law and give it a fair and reasonable construction, but he is bound to see that all its substantial requirements have been complied with. A special authority must be strictly pursued, and every purchaser presumed to know that special authority when it is confined and limited by statute. The estate of the purchaser is an acquisition by operation of law. The power is created by statute. The officer authorized to make the sale is appointed by law, and the time, place and

manner of sale are prescribed by law. The estate, therefore, depends upon the law for its validity. The law is the foundation of the title. It is the power of attorney of the officer that makes the sale. Therefore, a person claiming under a statute, must not only show the power, but a compliance with all its terms and requirements. However ambiguous it may be, consequences arising from an erroneous construction of it, cannot be averted either at law or in equity.

Denning v. Smith: 3 Johnson, Chan., 344; Blackwell's Tax Titles.

There is another rule equally well settled, that every person claiming title to real estate is chargeable with notice of all defects apparent upon the face of his muniments of title. In tax titles, the constitutional provision regulating the tax power, the statute levying the tax and prescribing the manner of enforcing its collection, and the acts of those to whom the execution of the power is entrusted, are all essential links in the chain of title. All of them are matters of record, and the purchaser is bound to take notice of all omissions or irregularities which have taken place in the proceedings, under which he claims the estate. He is, therefore, to look to it at his peril. The maxim *caveat emptor* applies in full force.

Battimore v. White: 2 Gill & Johnson, 444; Moore v. Brown: 4th McLean, 211.

A strict construction has always been given to tax titles.

Third Proposition.

The argument of this is embraced in the argument of the preceding proposition.

Fourth and Fifth Propositions.

Did the forfeiture and divestiture of the title of the defendant in error, take place before or after the sale by the commissioners? Could title to the land vest in the Government before sale? Section 4 of the act has been already quoted, and the language of this section excludes all doubt upon the point, the "words and upon the sale hereinafter provided for the land shall vest in the United States, or the purchasers at such sale in fee simple, etc., makes the meaning of the Congress transparent. But we are aided in our interpretation of this section by the distinguished judgment of this Court rendered in Bennett v. Hunter, reported in 9 Wallace, wherein the Court, following in the wake of the United States v. Repentigny, upheld the doctrine that a legislative act appropriating land was equivalent to office found, but maintained in the same case, in the same sentence, and almost in the same breath, that the legislative appropriation was not consummated until after sale made A sale was necessary to divest the owner, and vest the Government or any other purchaser with title. In the case of the United States against Repentigny, which was a grant by the Government of a part of the public domain upon cer-

tain conditions, the non-fulfillment of which made the land revert to the grantor, the Government. The land did not upon breach of condition by that fact alone, and at that instant become forfeited, so as to vest in the Government. It was not until after sale made that the legislative act appropriating the land was complete, and the title of the owner effectually divested.

Sixth Proposition.

Was compliance with the provisions of the statute essential to render the sale by the commissioners valid? In the various sections of the act prescribing regulations for the commissioners, it certainly cannot be maintained that the observance of these regulations by the commissioners were works of supererogation; that the law was superfluous, or that the legislature never intended it should be observed. The whole scheme of the act was to protect the citizen, while forcing him at the heaviest expense to render the full measure of his dues to meet the exigencies of the Government. It was not the design of Congress arbitrarily to strip the citizen of his property under the forms of taxation, without demand, proper notice, advertisement, or a compliance with any of the regulations. Where a statute creates a new power, and at the same time provides the means and mode of executing it, those to whom the power is entrusted can execute it only in the mode prescribed. This rule requires a rigid adherence to the directions and forms, which the

legislature have seen proper to lay down for the government of its agents. The power is purely arbitrary, and this furnishes a strong reason why it should not be exercised in an arbitrary manner. If the forms required to be observed are once departed from, there is an end of all legal restraint, and the discretion of the officer is bounded by his will alone.

6 Massachusetts, p. 14; 14 Idem, 289.

1 Blackford, 39; 1 Missouri, 428.

State v. Cole: 2 McCord, 117.

In order to support a tax sale, it must be shewn that the law was strictly complied with.

6 Wheaton, 119; 4 Peters, 349; 18 Howard, p. 137; 5 Cranch, 615.

The omission of any material act which the law requires, and which may prejudice the rights of the owner, will be fatal to the title of a purchaser at a tax sale. 6 McLean, 418.

A tax sale does not pass the title unless the assessment be so made as to enable the owner to ascertain that the land has been taxed.

Britton v. Locust Mountain Coal & Iron Co.: 16 American Law Register, 109.

There was no sufficient legal notice given to the defendant in error. In the case of Dean v. Nelson, decided in this Court and reported in the 4th volume of the American Law Times, it was held "that notice to parties within Confederate lines was not obtained by publication within Union lines."

What acts were incumbent upon the commissioners to do in regulating sales under the statute?

By the 14th section it is provided that tax books were to be kept, in which they shall enter or cause to be entered the amount or quota of said direct tax, assessed on each tract or parcel of land, which said amounts shall be distinctly stated in the advertisement or notice of sale, together with a description of the land to be sold, and an entry shall be made on such book or books of each tract sold, together with the name of the purchaser, and the sum for which the same may have been sold. The 13th section provides the mode of valuation in case of lost assessment, by taking evidence of the same.

The 7th section provides that the commissioners shall advertise the lands for sale. These are the most important sections bearing upon the duties of the commissioners, and sufficient for the purposes of the argument. Their citation naturally conducts us to that portion of the charge where the affirmative ruling of the Judge upon circuit authorized the finding of the jury, "that there was no such description of the premises to be sold as the law contemplated, and the advertisement was defective. That when the law making power required a description, it meant an intelligible description, which in effect described the premises, and an advertisement such as gave notice to the owner and the public of the particular property to be sold, that the owner might be put upon his guard of the danger to his property, and the public as to what was being sold, and the purchasers what they were buying.

The only description of the premises in this case is what

appears upon the record—lot E, block 61; tax, $56; penalty, $28; cost, $4.20; ten per cent., $5.20; total, $93.40; and thus advertised in a remote corner of the *Free South*, a sheet published in the town of Beaufort, without boundaries or admeasurement of the property, though they could have been easily obtained. The name of the owner of the property was not even mentioned in the advertisement, a fact so notoriously known as to have been mentioned in the local column of the paper containing the advertisement, and designated as the O'Connor house; no witnesses examined, nor evidence taken, and the whole of the preliminaries of the sale so arranged as to blind rather than advertise the owner and public. In fact such gross irregularity and disregard of the instructions of the law, stains the whole proceedings of the commissioners, as to reflect suspicion upon their integrity in the transaction. It seems from all the circumstances a little doubtful if an actual *bona fide* sale was ever made. It looks as if the commissioners seized and appropriated the property in the outset, and subsequently arranged the formalities to perfect their act. For why was the issuance of the certificate deferred until March, 1865, fifteen months after they had sold the same property, to Col. Moore, for $7,500. In the language of Judge Wilde, in Farnum v. Buffum, "In a sale like this, where a large and valuable property has been sold for a mere trifle, a compliance with all the provisions of the statute should be proved with great certainty in every particular." And in Reed v. Morton, 9 Missouri, 878, the Court, in speaking of the neglect of the

tax purchaser, to do as required by statute, says we do not feel ourselves called upon to give reasons why this thing should have been done. He who wishes to obtain an estate worth thousands for less than $10, under and by virtue of the law is not permitted to ask, why he should be required to do this, or that. It is an answer that it is required by law. *Ita lex scripta est*, nor can the plaintiff be protected by appealing to the proviso in the section of the act, to the effect, " that the certificate of said commissioners shall only be affected as evidence of the regularity and validity of the sale, by establishing the fact that such property was not subject to taxes, or that the taxes had been paid previous to sale, or that the property had been redeemed, according to the provisions of the act." The certificate, to be evidence at all, should be a regular certificate, and one issued in pursuance of the law. Was it such a certificate? It lacked the first essential. It was not signed by the three commissioners as the law required, and it purports to certify a sale in accordance with the act of Congress, which was never made. Where a general power of attorney is given to one to sell and convey an estate, a discretion is necessarily vested in the attorney, and latitude is allowed in the exercise of the authority. But if the owner of the estate prescribes in the instrument creating the power, the mode of its exercise, all the requirements of the warrant must be strictly complied with, or the power does not arise. But in this case the power to the commissioners is special, in which particular circumstances are required to attend the execution of it, and

where these forms are imposed, they are for the protection of all persons, and their observance is indispensable.

See Sugden on Powers, vol. 1.

The proceedings of the commissioners is not according to the course of common law, but a special jurisdiction and authority conferred by statute, and when this extraordinary authority or jurisdiction is exercised, it must appear upon the face of the record or proceedings, that all has been done which the law required should be done. The certificate is fatally defective, and cannot avail the plaintiff in error.

Young v. Lavain : 11 Illinois, 636, 637.

Thatcher v. Powell : 6 Wheaton, 119.

Seventh Proposition.

Was it a qualified or absolute forfeiture imposed by the 4th section of the act of 1862 upon the delinquent tax payer?

By the 9th section of the act of 1862 it is provided, "that in cases where the owners of said lots and parcels of ground have abandoned the same, and have not paid the tax thereon, as provided for in the third section of this act, and the said Board of Commissioners shall be satisfied that said owners have left the same to join the rebel forces, or otherwise to engage in and abet the rebellion, and the same shall have been struck off to the United States at said sale, the said commissioners shall, in the name of the United States, enter upon and take possession of the same, and may lease the

same, together or in parcels, to any person or persons who are citizens of the United States, or may have declared on oath their intention to become such, until said rebellion and insurrection in said State shall be put down, and the civil authority of the United States established; and until the people of said State shall elect a Legislature and State officers, who shall take an oath to support the Constitution of the United States, to be announced by the proclamation of the President, and until the first day of March next thereafter, the said leases to be in such form and with such security, as shall in the judgment of said commissioners produce to the United States the greatest revenue." The citation of this section opens the way to the only just and true interpretation of the act of Congress. It is patent by this, that Congress never intended absolutely to forfeit all the lands of the tax payer for delinquency. By this section, Congress seemed to have had in view the laws that governed the mother country and her colonies anterior to the revolution, and the adoption of the Federal Constitution respecting taxation. By the laws of the realm of Great Britain, and the States subject to, and acting under its code, forfeiture of the land assessed with the tax, was not recognized in any part of the British Dominions, nor in the States since their Independence, as a legal, proper mode of collecting the tax. The whole philosophy of English law, transmitted and inherited by us from our English ancestors, opposes directly the exercise of such an arbitrary power as forfeiture. It was in the light of ancient legislation, with respect to the fundamental

rights of the subject under the Crown, and the citizen under the Constitution of 1787, that Congress elaborated this piece of machinery, contained in the act of 1862, to coerce the payment by its citizens of their just share of the public burthen. The whole scope and design of the act was to compel payment in districts that were recusant and rebellious of all that was due by the citizens thereof to the Government. It was an act to enforce the realization of the direct tax laid, and no more. Therefore, Congress has by the section next above quoted, indicated its intention by directing the commissioners what disposition to make of the lands bought in, limiting their authority to lease until the insurrection and rebellion in said State shall be put down, and the civil authority of the United States established, and until the people of said State shall elect a Legislature and State officers, who shall take an oath to support the Constitution of the United States, to be announced by proclamation of the President, and until the 1st of March next thereafter. There were two objects before Congress when they enacted this statute—to force from the delinquent tax payer the amount of his due, and to protect the *bona fide* purchaser under a sale by the Government. There can be no doubt, that upon the expiration of the time limited for leasing by the commissioners, and no sale made under the law by them, where Government was in possession of the land, it was the design of Congress to terminate the forfeiture which had heretofore qualifiedly taken place, and make restoration of the soil to its lawful owner, annexing such conditions to

insure the tax that was due, as Congress in its judgment might deem proper. If the forfeiture provided for by the 4th section is to be regarded as absolute, and as a penalty upon persons engaged in rebellion against the United States, then it is a legislative conviction and punishment without trial of all who fail to pay the tax, and is a violation of the provisions of the Constitution, which forbids Congress to pass a bill of attainder, or that a citizen shall be deprived of his life, liberty or property, except by a judgment of his peers, or the law of the land. Such a view of the question is repugnant to the wisdom and justice of the American people, and cannot be maintained.

M. P. O'CONNOR,

Counsel for Defendant in Error.

SUPREME COURT UNITED STATES.

FROM SOUTH CAROLINA.

Samuel A. Cooley & Henry G. Judd,

PLAINTIFFS IN ERROR,

versus

MARY O'CONNOR, Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE UNITED STATES.

STATEMENT OF FACTS AND ARGUMENT.

M. P. O'CONNOR,

Counsel for Defendant in Error

Edward Perry, Printer, 149 Meeting Street, Charleston, S. C.

s.

In the Supreme Court of the United States.

DECEMBER TERM, 1870.

SAMUEL A. COOLEY AND HENRY G. JUDD,
Plaintiffs in Error,
vs.
MARY O'CONNOR.
} No. 236.

In Error to the Circuit Court of the United States for the District of South Carolina.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT.

This was an action of trespass to try title to certain real estate situated in the town of Beaufort, South Carolina, and occupied by defendants (the plaintiffs in error) as tenants of the United States—the title of the latter resting on a tax sale under the direct tax law. The suit was commenced in the court of common pleas for Beaufort county, where the declaration was filed on the 26th of January, 1869; but afterwards, on the petition of defendants, it was removed by *certiorari* to the circuit court of the United States for the district of South Carolina, where the cause was tried upon a plea of the general issue, and a verdict rendered for plaintiff (the defendant in error,) on which judgment was signed June

4, 1870. A bill of exceptions was taken, as it would seem, by both the plaintiff and the defendants; and the cause has been brought to this court by a writ of error sued out in the name of the latter.

It appears, from the bill of exceptions, that the defendants, to maintain and prove the issue on their part, among other things, offered in evidence the following tax sale certificate, the tract or parcel of land described therein being the property in controversy:

"*The United States of America, Tax-sale Certificate No.* 71.

"This is to certify that at a sale of lands for unpaid taxes, under and by virtue of an act entitled "An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes," held pursuant to notice at Beaufort, in the State of South Carolina, on the 13th day of March, A. D. 1863, the tract or parcel of land hereinafter described, situated in the town of Beaufort and State aforesaid, and described as follows, to wit: Lot E, in block 61, according to the plat of the town of Beaufort aforesaid, adopted by the United States direct tax commissioners for the district of South Carolina, was sold and struck off to the United States for the sum of one hundred and twenty-five dollars, being the highest sum bidden for the same, the receipt of which said sum in full is hereby acknowledged and confessed.

"Given under our hands, at Beaufort, this 13th day of March, A. D. 1865.

"WM. HENRY BRISBANE,
"WILLIAM E. WORDING,
"*Commissioners.*"

But the plaintiff objected to this certificate, on the

ground that it was signed by only two commissioners, and the court sustained the objection, holding it to be void for that cause; to which ruling the defendants excepted. (Record, p. 9.)

It further appears, that evidence was introduced by the defendants tending to show that, after the assessment of the tax on the premises, (the date of which assessment was November 3, 1862,) the commissioners gave notice, by posting in four public places in the town of Beaufort and parish of St. Helena, that a direct tax had been assessed by them upon the lands in the town of Beaufort and parish of St. Helena; that the same was payable within sixty days, and that the same might be paid at the office of the commissioners in Beaufort; that the taxes upon a very few of the lots, in pursuance of this notice, were paid to the commissioners, but not upon lot E, block 61, above described; that, after the expiration of sixty days, and on the 10th of January, 1863, the following notice and advertisement was published in a newspaper at Beaufort, called the "New South:"

"*Sale of Lands for Unpaid Direct Taxes in Insurrectionay Districts.*

"Notice is hereby given, that the several tracts or lots of lands situated in the State of South Carolina, hereinafter described, have become forfeited to the United States by reason of the non-payment thereon, under the act entitled 'An act to provide increased revenue from imports, to pay interest on the public debt, and for other purposes,' approved August 15, 1861, and an act

entitled 'An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes,' approved June [illegible] 1862,' and that the same will be sold at public auction on the 11th day of February, A. D. 1863, at 10 o'clock, a. m., of said day, at the office of the direct tax commissioners, under said acts, for the State of South Carolina, in the town of Beaufort, in the parish of St. Helena, Beaufort district and State aforesaid, and that the sale of the same will be continued from day to day until all of said lots and tracts of lands are finally disposed of.

"The following is a description of said lands forfeited as aforesaid, together with the amount of the quota of said tax and penalty charged upon each of said tracts or lots of land, respectively:

Town lots and lands in the parish of St. Helena.

Lots.	Blocks.	Quota of Tax.	Penalty.	Amount.
*	*	* *	* *.	* *
E	61	$56 00	$28 00	$84 00"
*	*	* *	* *	* *

Defendants also introduced evidence that said notice was published on the 10th of January, 1863, and for four weeks in said paper in succession thereafter, to wit, on the 17th, 24th, and 31st of January, and the 7th of February, 1863; and that said notice was also, during the same period of publication in the newspaper, posted up in four public places throughout the town of Beaufort and parish of St. Helena. (Record, pp. 10 and 11.)

Among other instructions prayed in behalf of defendants, the court was asked to charge the jury as follows:

"That if the property in question was advertised in the manner indicated in the five copies of the 'New South,' in evidence, as lot 'E, block 61; quota of tax, $56 00; penalty, $28 00; amount, $84 00;' and the same was posted up in four public places in the town of Beaufort, for four successive weeks, then such notice of the sale of the property was given by the tax commissioners as the law requires." But the court refused to so charge; on the contrary, it charged the jury that the advertisement referred to "is not such a notice as the law requires." To all which exception was taken. (See Record, pp. 17, 18, 21, and 24.)

Counsel for plaintiffs in error claim that the court below erred in ruling that the tax certificate offered in evidence was void, and also in refusing the instruction asked for in regard to the notice of sale, and charging the jury that it was not such as the law required.

FIRST POINT.

The court erred in holding that the tax sale certificate, being signed by only two commissioners, was on that account void.

1. This ruling is contrary to a familiar principle of law, viz., that where a body or board of officers is constituted by law to perform a trust for the public, or to execute a power or perform a duty prescribed by law, it is not necessary that all should concur in the act

done, but that the act of the majority is the act of the body.

Williams *vs.* School District, &c., 21 Pick., 82.

Sloo *vs* Law, 3 Bl. C. C. R, 472.

The King *vs.* Beeston, 3 T. R., 592.

And when nothing appears to the contrary, it will be *presumed* that the officer who did not join in the act done, met and consulted with those who did.

Doughty *vs.* Hope, 3 Denio, 249.

McCoy *vs.* Curtice, 9 Wend., 17.

2. Besides, it is in direct conflict with a positive provision of the legislature. For by the 3d section of the act of March 3, 1865, (13 Stat., 502,) Congress declares "That a majority of a board of tax commissioners shall have full authority to transact all business and to perform all duties required by law to be performed by such board, and no proceeding of any board of tax commissioners shall be void or invalid in consequence of the absence of any one of said commissioners." This enactment, it will be observed, was in force when the certificate was issued.

The record shows that a board of three direct tax commissioners had been appointed for the State of South Carolina; that all the members of the board had entered upon the discharge of their duties, and that they were all present at the meeting of the board on the 13th of March, 1863, when the sale of the premises took place, (Record, p. 11.) Two of these commissioners afterwards, to wit, on the 13th of March, 1865, issued the

certificate mentioned, and the record is entirely silent as to the other commissioner at this period. But the presumption is, in the absence of anything appearing in the record to the contrary, that a full board then existed, it being shown to have existed a comparatively short time previous. So that, even if the section above quoted should be regarded as requiring a full board to be in existence, and as providing only that a majority of that board can act, the present case must be deemed to fall within its purview.

3. The statutory provision just mentioned extends to the transaction of all business, and to the performance of all duties required by law to be performed by the board.

We contend that from the language and design of the act under which the property was sold, it was as much the duty of the commissioners to issue a certificate in case of a sale to the United States, as it was in the case of a sale to a private party. The act referred to, namely, the act of February 6, 1863, (12 Stat., 640,) provides: "That the said board of commissioners shall be required * * * at the time and place of sale to cause the same [the lots and parcels of land] to be severally sold to the highest bidder for a sum not less than the taxes, penalty, and costs, &c; in all cases where the owner, &c., shall not, on or before the day of sale, appear in person before the said board of commissioners and pay the amount of said tax, &c., or request

the same to be struck off to a purchaser for a less sum than two-thirds of the assessed value, &c., the said commissioners shall be authorized at said sale to bid off the same for the United States at a sum not exceeding two-thirds of the assessed value thereof, unless some person shall bid a larger sum; and in that case the same shall be struck off to the highest bidder, who shall * * * be entitled to receive from said commissioners their certificate of sale," &c. Thus it will be seen that, under the statute, a sale of the property for unpaid taxes, &c., was authorized to be made—

1st. To the highest bidder, for a sum not less than the taxes, penalty, costs, &c.; or

2d. To a purchaser, at request of owner, for a less sum than two-thirds of assessed value; and in the absence of such request,

3d. To the United States at a sum not exceeding two-thirds of assessed value, unless some person should bid more; and in that event, then

4th. To the highest bidder.

Now, if the meaning of the clause, "who shall * * be entitled to receive from said commissioners their certificate of sale," is to be regarded as governed entirely by the collocation of the words in the sentence, and the relative "who" to refer only to the next antecedent, viz., "highest bidder," it must be taken to apply exclusively to the last of the purchasers enumerated above, and to make that purchaser alone entitled to a certificate of sale. But this strict grammatical con-

struction is manifestly inconsistent with the intention of the legislature. It was unquestionably the design of Congress that each and every purchaser should be furnished with such certificate as evidence of title to property acquired under the act. This clearly appears from the next succeeding clause in the same act: "which said certificate shall be received in all courts and places as *prima facie* evidence, &c., of the title of the said purchaser or purchasers under the same." Here the words, "said purchaser or purchasers," embrace not only the *purchaser* to whom the property is struck off at the request of the owner, (and who is the only party thus designated in the preceding portion of the statute,) but also the *highest bidder*, including the *United States*, where the property is struck off to either of these purchasers. So that, properly, the first-mentioned clause should be construed to override the whole of the preceding part of the act relating to sales of property by the board, and to entitle each description of purchaser, the Government included, to a certificate.

4. In declaring the tax void, the court deprived the defendants of the benefit, on the trial, of what the statute declares shall be received in all courts and places as *prima facie* evidence of the *regularity* and *validity* of the sale, and of the *title* of the purchaser. Practically, the admission of the certificate was of great importance to them, as it rendered unnecessary the preliminary proof of statutory requirements relating to the proceedings of the officers engaged in executing the law, for the purpose of making out a title.

SECOND POINT.

The court erred in instructing the jury that the advertisement was "not such a notice as the law requires."

The impression with the court seems to have been, that inasmuch as the advertisement failed to state that "the whole town of Beaufort was to be sold," it did not contain such notice as would make the owner aware that his particular property had been assessed and was up for sale.

There is enough in the record to show that the provisions of the statute were fully complied with in respect to the mode, place, and time of advertising, (Record, pp. 10 and 11,) and the advertisement itself appears to contain as particular a description of the several tracts or lots as it was possible under the circumstances to give. (*Ibid.*, pp. 9 and 10.) This, it is conceived, entirely satisfied the requirements of the law as to notice.

We submit that the errors complained of worked great injury to the defendants' case, and that, but for those errors, the issue might have resulted differently.

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